80-880

Supreme Court, U. S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1980

No. _____

CONTINENTAL OIL COMPANY *Petitioner*

V.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Court by this Petition for Certiorari are:

1. Whether, under the facts of this case, Continental Oil Company, which has since changed its name to Conoco, Inc., (the "Petitioner") violated 29 U.S.C. § 654(a)(1), the "general duty clause" of the Occupational Safety and Health Act of 1970, (herein sometimes called the "Act").

2. What is the standard for determining whether an employer has violated the general duty clause?

3. Is the general duty clause, under the standard applied by the U.S. Court of Appeals for the Sixth Circuit, unenforceably vague in violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

4. Is the duty imposed upon employers by the general duty clause as interpreted by the U. S. Court of Appeals for the Sixth Circuit higher than that which Congress intended?

LIST OF ALL PARTIES TO THE PROCEEDING

Continental Oil Company
(now Conoco, Inc.)

Occupational Safety and Health
Review Commission

Secretary of Labor
U. S. Department of Labor

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STATEMENT OF JURISDICTIONAL GROUNDS

(i) Judgment was entered in this cause by the U.S. Court of Appeals for the Sixth Circuit on September 2, 1980.

(ii) United States Court of Appeals for the Sixth Circuit entered an order denying Petitioner's Petition for Rehearing In Banc on November 4, 1980.

(iii) Jurisdiction to review this case by Petition for Certiorari is conferred by 28 U.S.C. § 1254.

STATUTE AND CONSTITUTIONAL PROVISION WHICH THIS CASE INVOLVES

29 U.S.C. § 654(a)(1)

Each employer - (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner operated a pipeline terminal facility in Chattanooga, Tennessee. Petroleum products were pumped into large tanks located at the facility from a common carrier pipeline. On September 25, 1972 one of these tanks overflowed and there was a resulting fire. Petitioner was cited inter alia for a violation of 29 U.S.C. § 654(a)(1), the general duty clause of the Act. The citation, in pertinent part, read as follows:

> The employer failed to furnish his employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee a place of employment which was free from recognized hazards that were causing or

were likely to cause death or serious physical harm to his employees in that:

(1) ...

(2) ...

(3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

Petitioner followed procedures which it had established for the purpose of receiving product from the pipeline and protecting against the occurrence of tank overflows. Briefly, these procedures consisted of the terminal manager ascertaining the product delivery schedule; maintaining contact with the pipeline; premeasuring and gauging the product in each tank to determine tank capacity; lining up the valves to direct the product to the correct tank; and being physically present at the terminal prior to the commencement of delivery and also at the termination of the delivery.

Nevertheless, the Secretary of Labor maintained pursuant to the above quoted charge that Petitioner should have employed other safety measures, to-wit: "high level alarms" on the tanks or should have had persons present at the facility at all times during delivery of product.

After a hearing held in accordance with the procedures established by the Act the Administrative Law Judge held inter alia that Petitioner had not violated the Act, concluding that the industry did not recognize high level alarms as a necessity for safe operations and that the industry did not consider it a hazard not to have persons present at all times during the pipeline deliveries.

On review, a divided Occupational Safety and Health Review Commission (the "Commission") on June 9, 1975 affirmed the decision of the Administrative Law Judge in this respect.

The Secretary of Labor petitioned the

United States Court of Appeals for the Sixth Circuit for review of the Commission's decision. On October 17, 1977 the Sixth Circuit remanded the case to the Commission on motion of the Secretary of Labor.

On remand, a newly constituted Commission on July 20, 1978 reversed itself and determined that the Petitioner had violated the general duty clause of the Act.

Petitioner petitioned the Sixth Circuit pursuant to 29 U.S.C. § 660(a) for a review of the Commission's second decision. On September 2, 1980, the Sixth Circuit affirmed the Commission, concluding that the Petitioner had violated the general duty clause. On November 4, 1980, the Sixth Circuit denied Petitioner's petition for a rehearing en banc.

BASIS FOR FEDERAL JURISDICTION

This case rises pursuant to the Occupational Safety and Health Act of 1970, 28 U.S.C. § 651 et seq., which confers appellate

jurisdiction upon the U. S. Courts of Appeal.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(a) The decisions of different Federal Courts of Appeal are in conflict with respect to the proper test which is to be used to determine whether an employer has violated the general duty clause.

The test utilized by the Sixth Circuit in this case approaches a strict liability standard. In the view of the Sixth Circuit, there is a "recognized hazard" when the employer has knowledge of an underlying safety risk. In this case, the "recognized hazard" was the admitted fact that spilled gasoline is hazardous. In a roofing case, the "recognized hazard" might be that falling off roofs is hazardous. Once such an obvious recognized hazard is established, either by reference to the employer's actual knowledge or by the standard of knowledge in the relevant industry, the employer is then required to do everything which the Secretary of Labor can prove is feasible to protect against that

hazard. This view is shared by the U.S. Court of Appeals for the District of Columbia. National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission, 489 F. 2d 1257 (D.C. Cir. 1973).

Other courts take a quite different view. Here the focus is upon whether the safety precautions taken (or not taken) by the employer is a "recognized hazard". In making this determination the courts subscribing to this view employ a "reasonable man" test. Moreover, the behavior of the reasonable man is to be governed by the practice of employers in the relevant industry. In B & B Insulation, Inc., 583 F. 2d 1364 (5th Cir. 1978), the Fifth Circuit said (at p. 1370 of 583 F. 2nd):

> Where the reasonable man is used to interpolate specific duties from general OSHA regulations, the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry. The purpose of the Act is preventive rather than compensatory. Achievement of its

goal of reducing industrial accidents depends upon employer compliance through elimination of legislatively identified safety and health hazards by prescribed remedial measures. Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident.

The Act indicates that Congress thought specificity of standards desirable. In light of the Act's preventive purpose and the intended specificity of its standards, the employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated in his industry should not generally bear an extra burden.

Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit, the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of general standards being inappropriate to achieve such a purpose. The use of standard-making procedures assures that no only would employers be apprised of the conduct required of them and responsibility for upgrading the safety of the industry would be borne equally by all its members, but the resulting standard would benefit from imput of the industry's

> experts, both employer and employee, cost and technology obstacles faced by the industry could be weighed, and more interested parties can participate in the process.

B & B Insulation, supra, was a case involving a general safety standard promulgated under the Act. The court said, however, that the same approach would be taken with the general duty clause which is at least as imprecise as that of the standard there dealt with. Other Fifth Circuit cases taking this view, some of which deal with safety standards and some of which deal with the general duty clause itself are: R. L. Sanders Roofing Company, 620 F. 2d 97 (5th Cir. 1980); Power Plant Div. v. Occupational Safety and Health Review Commission, 590 F. 2d 1363 (5th Cir. 1979); Cotter & Company v. Occupational Safety and Health Review Commission, 598 F. 2d 911 (5th Cir. 1979); Getty Oil Co. v. Occupational Safety and Health Review Commission, 530 F. 2d 1143 (5th Cir. 1976).

The Fifth Circuit's view is shared by the Tenth Circuit, H-30, Inc. v. Marshall, 597

F. 2d 234 (10th Cir. 1979); and by the Seventh Circuit, Marshall v. L. E. Myers Company, 589 F. 2d 270 (7th Cir. 1978); Brennan v. OSHRC and Republic Creosoting Co., 501 F. 2d 1196 (7th Cir. 1974).

Still a third test is applied by other circuits. These courts also use the reasonable man standard. However, under their view the custom and practice in the relevant industry is evidence of, but not necessarily determinative of, what a reasonable man or "reasonably conscientious safety expert" would do. This view seems to be held by the Third Circuit, Voegle Company, Inc. v. Occupational Safety and Health Review Commission, 625 F. 2d 1075 (3rd Cir. 1980); the Ninth Circuit, Magma Copper Company v. Marshall, 608 F. 2d 393 (9th Cir. 1979); the Fourth Circuit, Bristol Steel & Iron Works, Inc. v. Occupational Safety and Health Review Commission, 601 F. 2d 717 (4th Cir. 1979); and the First Circuit, General

Dynamics v. Occupational Safety and Health Review Commission, 599 F. 2d 453 (1st Cir. 1979).

The Occupational Safety and Health Act of 1970 is an important statute. Its provisions intimately affect every phase of the business operations of Petitioner and other companies who operate in many areas of the country. Where none of the Act's specific safety standards apply, Petitioner and other employers are entitled to know by what standard they are to be judged. The diversity of the above holdings calls for the exercise of this Court's power of supervision.

(b) The general duty clause is unconstitutionally vague and therefore unenforceable under the due process clause of Fifth Amendment.

Enforcement of the general duty clause, 29 U.S.C. § 654 would violate the due process clause of the Fifth Amendment. This Court has long invalidated impermissibly vague

statutes under the Fifth and Fourteenth Amendment due process clauses. See, e.g. International Harvester v. Kentucky, 234 U.S. 216 (1914). Mr. Justice Sutherland first announced the current test for vagueness in Connally v. General Construction Co., 269 U.S. 385, 391 (1926):

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Therefore, to survive constitutional attack, the statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." 269 U.S. at 391.

Vague laws are most often said to offend due process for two reasons. First, because our judicial system assumes individuals have the freedom to choose between legal and

illegal conduct, our laws should be sufficiently definite for one to chart a course comporting with the law. Second, laws must be reasonably clear so that officials charged with administering the law will be unable to enforce the law in an arbitrary or capricious manner. See Thompson v. Southwest School District, 483 F. Supp. 1170, 1178 (W.D. Mo. 1980).

While the Connally case invalidated a criminal statute, this Court has applied the same test to non-criminal statutes, recognizing that indefiniteness in either type of statute fails to provide fair warning of proscribed conduct to affected individuals. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also, Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1335-36 (6th Cir. 1978).

The Act and the regulations promulgated under it have spawned litigation in several circuits over whether various provisions were sufficiently definite to satisfy the Fifth Amend-

ment's due process standards. See, e.g., Lockrem v. United States, 609 F. 2d 940 (9th Cir. 1979); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, 583 F. 2d 1364 (5th Cir. 1978); Diebold, Inc. v. Marshall, 585 F. 2d 1327, (6th Cir. 1978); Hoffman Construction Co. v. Occupational Safety and Health Review Commission, 546 F. 2d 281 (9th Cir. 1976); Cape and Vineyard Div., et al. v. Occupational Safety and Health Review Commission, 512 F. 2d 1148 (1st Cir. 1975); Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974).

In Hoffman Construction Co. v. Occupational Safety and Health Review Commission, supra, the Ninth Circuit considered the following regulation:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions and where this part indicates the need for using such equipment to reduce the hazards to the employees.

546 F. 2d at 283 (quoting 29 C.F.R. § 1926.28(a) (1972)). After noting that members of the Occupational Safety and Health Review Commission had placed three different interpretations on the regulation, the court refused to enforce a regulation so vague that it created no specific standard. The regulation itself contained no criteria for measuring an employer's conduct, and the surrounding regulations added nothing "to the reader's general intuition that workmen exposed to a height hazard need some protection." 546 F. 2d at 283. The court therefore reversed the Commission's assessment of a fine.

Similarly, the general duty clause, 29 U.S.C. § 654, is unconstituionally vague under the due process clause of the Fifth Amendment. The statute provides:

> (a) Each employer --
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or

> serious physical harm to his employees;
>
> ...

This statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., supra. As has been stated earlier, the United States Courts of Appeal have interpreted the general duty clause to have three different meanings. Compare, B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra with General Dynamics Corporation v. Occupational Safety and Health Review Commission, 599 F. 2d 453 (1st Cir. 1979) and Continental Oil Company v. Occupational Safety and Health Review Commission, No. 78-3445 (6th Cir. 9/2/80)(See Separate Appendix). If federal judges must necessarily guess at the general duty clause's meaning and differ as to its applications, certainly the average employer, also being a man of common intelligence, could hardly be expected to divine

what course of action Congress or the Secretary of Labor expects of him. Plainly, the statute does not warn employers what conduct will render them liable for the statute's penalties.

Rather, the general duty clause has become a post hac justification for penalizing an employer. As is evident, neither the general duty clause nor the several cases interpreting it have clarified the clause's standards for employers.

As the Field Operations Manual, published by the Occupational Safety and Health Administration, explains in outlining guidelines for inspectors (Compliance Safety and Health Officers):

> The general duty provisions should be used in inspections only where there are no specific standards applicable to the particular hazard involved....

CCH, OSHA Field Operations Manual, ¶ 4360.1 at 46 (January, 1979)(emphasis in original). The

general duty clause is, therefore, a catchall. However, this fact does not excuse its vagueness. No more striking instance could be found of a statute "so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork." L. Tribe, American Constitutional Law, § 12-28, at 718 (1978).

If Petitioner had known manned delivery systems or high level alarms were needed to warn of tank overflow, it would have received a constitutionally sufficient warning of the general duty clause's requirements. Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1337 (6th Cir. 1978). But knowledge in the abstract that spilled gasoline may be hazardous does not constitute a recognition that manned delivery systems or high level alarms or systems are needed in the particular. A central purpose and policy of the Act is the elimination of dangerous conditions in the workplace "by encouraging employers...in their efforts to reduce

the number of occupational safety and health hazards." 29 U.S.C. § 651(b)(1). Obviously, unless he recognizes the particular hazard in his workplace, the employer cannot correct the hazard and, more importantly, should not be expected to correct it. Thus, because Petitioner did not recognize (nor did the industry recognize) that automatic detection devices or manned delivery were needed, no constitutionally sufficient warning existed.

It is also well-settled that judicial interpretations may save an otherwise unconstitutionally vague statute by supplying standards for the statute's application. See, e.g., Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra. But judicial construction of the general duty clause has only further obscured an already inscrutable statute. Instead of giving uniform content to

the term "recognized hazard" the Circuit Courts of Appeal have split, some focusing on the obviousness of the hazard in the abstract, while others stress whether the employer's conduct comported with what a reasonable man would do in similar circumstances (with some Circuits disagreeing over whether the reasonable man would be more cautious than employers in the relevant industry).

This vague and confusing statute illustrates dramatically the two previously mentioned policies for the constitutional requirement of definiteness -- to provide guidance for those subject to the statute as well as for those charged with its enforcement. An employer, especially one with a nationwide operation such as the Petitioner, can hardly be expected to intelligently conform his conduct to any specific standard when confronted with this morass of statutes, regulations, and contradictory judicial pronouncements. Furthermore, a local inspector walking through an employer's

plant can certainly summon no more order to this confusing state of affairs than the courts have done after secluded reflection. Without assistance from Congress, the courts or the agency, no standard serves to inform an inspector's discretion as he seeks to apply the general duty clause to a concrete factual setting. Nothing ensures that the nation's employers are being subjected to a uniform and definite standard that does not vary with the whims of individual inspectors. Due process requires at least this assurance.

(c) As it has been interpreted by the Sixth Circuit, the general duty clause is unconstitutionally vague and therefore unenforceable under the due process clause of the Fifth Amendment.

Only one judicial interpretation will save the general duty clause from being unconstitutionally vague under the Fifth Amendment. The Fifth Circuit has held, when confronted with

similarly vague regulatory provisions under the Act, that the reasonable man test must be implied into imprecise standards to offer at least the modicum of certainty required by the Constitution. See, e.g., Cotter & Co. v. Occupational Safety and Health Review Commission, 598 F. 2d 911 (5th Cir. 1979); Power Plant Division v. Occupational Safety and Health Review Commission, 590 F. 2d 1363, 1365 (5th Cir. 1979); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, 583 F. 2d 1364 (5th Cir. 1978); Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974).

In B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra, the Fifth Circuit considered the constitutionality of the following regulation:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using

> such equipment to reduce the hazards to the employees.

583 F. 2d at 1366 fn. 1 (quoting 29 C.F.R. § 1926.28(a)). After noting that due process required a "sufficiently definite warning as to the proscribed conduct," and recognizing that the Ninth Circuit in Hoffman Construction Co. v. Occupational Safety and Health Review Commission, 546 F. 2d 281 (9th Cir. 1976), had already ruled this regulation unconstitutionally vague, the Fifth Circuit declared:

> For the objectivity needed to rescue § 1926.28(a) from unconstitutional uncertainty, however, we look to cases construing analogous OSHA standards and to the tort law concept of the 'reasonable man.' ... The reasonable person approach...accords with congressional purpose as reflected in the general duty clause of the statute itself... The 'reasonable man' is, of course, a fictional character borrowed from tort law wherein his conduct sets the standard below which behavior constitutes negligence....Where the reasonable man is used to interpolate specific duties from general OSHA regulations,

> the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry. The purpose of the Act is preventive rather than compensatory. Achievement of its goal of reducing industrial accidents depends upon employer compliance through an elimination of legislatively identified safety and health hazards by prescribed remedial measures. Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident.
>
> The Act indicates that Congress thought specificity of standards desirable. In light of the Act's preventive purpose and the intended specificity of its standards, the employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated industry should generally not bear an extra burden.

583 F. 2d at 1369-71 (citations omitted).

As has been discussed earlier, the Sixth Circuit has refused to apply any of the various reasonable man standards adopted by the First, Third, Fourth, Fifth, Seventh, Ninth and

Tenth Circuit Courts. By failing to adopt any reasonable man standard, the Sixth Circuit has given no guidance to employers -- or inspectors -- in determining whether the employer's conduct accords with the general duty clauses requirements. Thus, the Sixth Circuit has failed in this case to construe the general duty clause in a manner that would save it from invalidity. Therefore, the general duty clause, as interpreted by the Sixth Circuit, is unenforceable against the Petitioner under the due process clause of the Fifth Amendment.

(d) The Sixth Circuit's interpretation of the general duty clause is not in compliance with the Act since it imposes a higher duty upon employers than can the Secretary of Labor by a promulgated safety standard.

The Sixth Circuit and the District of Columbia Circuit, National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission, 489 F. 2d 1257 (D.C. Cir. 1973), held that the general duty clause requires the employer to do what is feasible.

These cases do not define what is "feasible." The result is a general duty "standard" that is higher than any specific standard which the Secretary of Labor can promulgate under the Act. Marshall v. American Petroleum Institute, ___ U.S. ___, 65 L.Ed. 2d 1010, 100 S.Ct. ___ (1980). In the American Petroleum Institute case, supra, it was determined by a majority of the Court that Congress had not given the Secretary of Labor the power to promulgate a safety standard based upon criteria "limited only by the constraint of feasibility," 65 L.Ed. at 1037, however feasibility is defined. It was held that in promulgating safety standards, the Secretary of Labor was to consider the provisions of Section 3(8), 29 U.S.C. § 652(8), of the Act which defines an "occupational safety and health standard" as

> "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

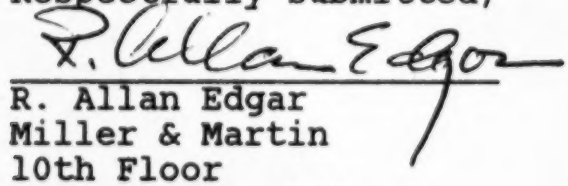
> reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (emphasis supplied)

Surely it was never the intent of Congress to impose upon employers a higher duty through the general duty clause than the Secretary of Labor can impose through regulation. This, it is submitted, is an important question of federal law which has not been, but should be, settled by this Court.

STATEMENT PURSUANT TO RULE 28.4(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

28 U.S.C. § 2403(a) may be applicable to this case. To Petitioner's knowledge, no court has certified to the Attorney General the fact that the constitutionality of an Act of Congress has been drawn in question in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of November, 1980, I served the above Petition for Certiorari on behalf of the Petitioner by depositing three (3) copies thereof in a United States post office or mailbox with first-class postage prepaid to all counsel of record and also to the Solicitor General at the following addresses, all in accordance with Rule 28 of the Rules of the Supreme Court of the United States:

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No. 78-3445

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONTINENTAL OIL COMPANY, *Petitioner,* v. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR, *Respondents.*	ON PETITION to Review an Order of The Occupational Safety and Health Review Commission.

Decided and Filed September 2, 1980.

Before CELEBREZZE and KEITH, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. This case is before the court on petition to review the order of the Occupational Safety and Health Review Commission affirming the Secretary of Labor's citation against petitioner for violation of the general duty clause of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1). We affirm.

Petitioner, Continental Oil Company, operates a pipeline terminal facility in Chattanooga, Tennessee. Petroleum products are stored in large tanks. The products are piped into the facility from a common carrier pipeline which has a centralized dispatch facility in Atlanta, Georgia, and a local dispatch facility near the tank farm. Distribution of the products is then made in trucks which load at the farm and make local deliveries.

At the time of the accident giving rise to this proceeding, the tank farm was operated by a single employee, the terminal manager. The scheduling of pipeline deliveries would begin approximately three months prior to the actual delivery, with frequent updates. The terminal manager was required to be present at the farm one hour prior to each delivery to check the available capacity of each tank. He was then free to leave the facility during delivery but was required to return prior to the completion of each delivery. He could stop the product flow by a simple telephone call to either the local or Atlanta dispatcher. By this procedure Continental undertook to protect against the hazard of accidental overflows during product delivery at the farm.

On the morning of September 25, 1972, a truck driver was preparing to load his truck at the tank farm when he discovered a tank overflowing. He left the premises and notified the terminal manager and the police. Ross, the terminal manager, entered the terminal area against the advice of firefighters in an attempt to close the valves manually. An explosion and fire erupted, killing Ross and two workers in a nearby plant.

The Secretary charged that Continental violated the general duty clause of the Act because Continental did not provide automatic detection devices or manned delivery systems to protect against overflows. On August 10, 1973, an Administrative Law Judge vacated the general duty clause violation. On review, the Commission, with one seat vacant, affirmed this aspect of the ALJ's decision with a 1-1 vote. The Secretary petitioned this court for review and we remanded to the Commission upon motion of the Secretary. *Dunlop* v. *Continental Oil Co.*, No. 75-1961 (6th Cir. Oct. 17, 1977). On remand, the full Commission, one member abstaining, affirmed the citation with respect to the violation of the general duty clause.

The issue before this court is whether there is substantial evidence in the record to support the Commission's finding

that Continental violated the general duty clause of the Act, 29 U.S.C. § 654(a)(1), by failing to free its facility of the dangers created by product overflow; that is, by failing to employ automatic detection devices or manned deliveries to detect accidental overflows.

In establishing a violation of the general duty clause, it is incumbent upon the Secretary to prove "(1) that the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious physical harm.'"[1] *Empire-Detroit Steel* v. *OSHRC*, 579 F.2d 378 (6th Cir. 1978).

In its brief, Continental states that "it has never disputed the fact that spilled gasoline is hazardous," but contends that to establish a "recognized hazard" the Secretary must constitute that some action that Continental did or did not take is recognized as hazardous in the industry. However, Continental's admitted knowledge of the dangerous potential of spilled petroleum products is sufficient to establish a "recognized hazard." *Empire-Detroit Steel, supra*, 579 F.2d at 383; *Usery* v. *Marquette Cement Manufacturing Co.*, 568 F.2d 902, 910 (2d Cir. 1977); *Cape & Vineyard Div.* v. *OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *Brennan* v. *OSHRC (Vy Lactos Laboratories, Inc.)*, 494 F.2d 460, 463-64 (8th Cir. 1974).

The question of whether a hazard is recognized goes to the knowledge of the employer, or if he lacks actual knowledge, to the standard of knowledge in the industry – an objective test. *Marquette Cement Manufacturing Co., supra*, 568 F.2d at 910; *National Realty and Construction Company,*

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[1] 29 U.S.C. § 654(a)(1) reads in pertinent part:

§ 654. Duties of employer and employee

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Inc. v. *OSHRC*, 489 F.2d 1257, 1265, n.32 (D.C. 1973); 116 Cong. Rec. 38377 (1970); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L.R. 988, n. 37 (1973).

The Commission found that Continental recognized the hazards posed by overflows of this inherently dangerous product and that Continental was aware of a similar explosion at another tank farm which, like Continental, used an unmanned delivery system.

The question of the steps taken to alleviate the recognized hazard goes to the issue of whether the employer has "failed to render its workplace 'free' of [the] hazard." *National Realty, supra*, 489 F.2d at 1266-67. We must determine whether there is substantial evidence in the record to support the finding of the Commission that Continental did not render its workplace "free" of the hazard.

Just what an employer must do to render its workplace free of a recognized hazard has been the subject of much discussion. In *National Realty, supra*, 489 F.2d at 1265-66, the court said:

> Construing the term in the present context presents a dilemma. On the one hand, the adjective is unqualified and absolute: A workplace cannot be just "reasonably free" of a hazard, or merely as free as the average workplace in the industry. On the other hand, Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one. (Footnotes omitted.)

And, *id.* at 1265, n. 34:

> Though the Senate and House committee reports on the Act stated that the general duty clause incorporated "common law principles," the standard of care imposed by the clause was not characterized in terms of reasonableness. Rather, the reports speak of a
>
> general and common duty to bring *no* adverse ef-

> fects to the life and health of their employees throughout the course of their employment.

H.R.Rep.No.91-1291, *supra* note 7, at 21; S.Rep.No.91-1282, *supra* note 27, at 9, U.S. Code Cong. & Admin. News, 1970, p. 5186. (Emphasis added.) Overtones of the reasonableness standard are to be found only in the Act's definition of a *serious* violation, *see* note 41 *infra*. That employers must take more than merely "reasonable" precautions for the safety of employees follows from the great control which employers exert over the conduct and working conditions of employees. *See* H.R.Rep.No.91-1291, *id. and* S.Rep.No.91-1282, *id.*

The Secretary, in the citation issued to Continental charged that:

> The employer failed to furnish his employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees in that:
>
> • • •
>
> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

The record shows that Continental's procedure for freeing the workplace of this hazard consisted of calculating the tank volume available for incoming products, having the tank farm manager on the premises one hour prior to each delivery and then requiring him to return to the farm prior to the completion of the delivery. Continental stresses that delivery could be shut down immediately by telephoning either of two dispatcher locations or manually shutting off the valves at the farm itself. It is evident that these procedures would

be fruitless if a tank overflow during the delivery period when the farm manager is not on the premises. The record also shows that other farms, but not necessarily all tank farms, utilized either manned delivery systems, high level alarms, or both.

As the court said in *National Realty, supra,* 489 F.2d at 1266, n. 37:

> This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Similarly, a precaution does not become infeasible merely because it is expensive. But if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promulated (sic) regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause.

See also Voegele Co., Inc. v. *OSHRC,* — F.2d — (No. 79-2439, 3rd Cir. June 26, 1980); *Ray Evers Welding Co.* v. *OSHRC,* — F.2d — (6th Cir. 1980), (No. 77-3581, Apr. 29, 1980); *General Dynamics Corp.* v. *OSHRC,* 599 F.2d 453 (1st Cir. 1979).

Further:

> Though the level of hazard *recognition* required by the 'general duty' clause is measured against industry employer knowledge . . . an abatement order under section 5(a)(1) may require that work practices and safety precautions be upgraded to a feasible level which is above that considered customary or 'reasonable' by an industry. (Citations omitted.) *Southern Railway Co.,* [1975-1976] CCH OSHD ¶ 20,091 (1975).

The record shows specific instances where some of the other tank farms in the industry employed delivery systems

or high level alarms, the safety precautions proffered by the Secretary. Witnesses for both the Secretary and Continental recognized the safety utility of these controls. The record establishes the feasibility and reasonableness of utilizing these controls either alone or in concert with each other. It also supports the conclusion that Continental's procedure was inadequate at the time of the accident.

We conclude that there is substantial evidence in the record to support the finding of the Commission that Continental violated the general duty clause of 29 U.S.C. § 654 (a)(1) by failing to free its facility of the dangers created by product overflow. Accordingly, the order of the Occupational Safety and Health Review Commission affirming the Secretary of Labor's citation is affirmed. .

No. 78-3445

FILED
NOV 4 1980
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONTINENTAL OIL CO.	)	
	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
	)	
SECRETARY OF LABOR and OSH REVIEW COMMISSION	)	

Before KEITH, Circuit Judge, and PHILLIPS and CELEBREZZE, Senior Circuit Judges.

A majority of the judges of this court in regular active service having not voted in favor of en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that the petition be and hereby is denied.

Entered by order of the court.

John P. Hehman
CLERK

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 1829
CONTINENTAL OIL CO.,	:	
Respondent.	:	
	:	

DECISION

Before CLEARY, Chairman; BARNAKO, Commissioner.*

BARNAKO, Commissioner:

This case is before the Commission on remand from the United States Court of Appeals for the Sixth Circuit. Dunlop v. Continental Oil Co., No. 75-1961 (6th Cir. 1977). The Court directed us to reconsider and attempt to resolve our prior decision which, by an equally divided vote, affirmed an Administrative Law Judge's decision. Continental Oil Co., 75 OSAHRC 65/B4, 3 BNA OSHC 1225, 1974-75 CCH OSHD para. 19,717 (No. 1829, 1975). The Judge had held that the Respondent (Continental) did not violate the general duty clause (Section 5(a)(1)) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et. seq.).1/

* Commissioner COTTINE took no part in the consideration or decision of this case for the reasons set forth in his separate opinion.

1/ All other aspects of the case had been unanimously disposed of by the Commission. Neither party took exception to those aspects before the Court of Appeals.

The case arose following a fatal explosion and fire at Continental's petroleum storage tank farm outside of Atlanta. Under normal circumstances, a tank was filled by attaching a pipeline to the tank and then leaving the tank unattended for a predetermined length of time during which gasoline flowed into it. For unknown reasons this procedure malfunctioned on September 25, 1972. The pipeline did not shut off at the proper time and gasoline overflowed from the tank. George Douglas, a truck driver, spotted the escaping fuel when he arrived to load his delivery truck. He telephoned the terminal manager, Don Ross, who went to the tank farm and entered the facility in order to manually shut off the flow control valve from the pipeline into the tank. While he attempted to do so, a violent explosion occurred, killing him as well as two employees of a nearby rubber company.

The resulting citation alleged that the respondent violated Section 5(a)(1)[2/] of the Act in three respects including:

> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

2/ Section 5(a)(1) provides that:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The Judge vacated the citation. With respect to the above allegation, he concluded that since none of the suggested preventive devices, including manned receipt and automatic detection devices, were standard practice in the bulk petroleum storage industry, there was no "recognized hazard."

Former Commissioner Moran agreed with this reasoning. Chairman Cleary disagreed, and set forth the reasons why he would have reversed the Judge and found a violation of section 5(a)(1).[3/] Having carefully reviewed the entire record, we reverse the Judge and affirm the citation for the following reasons.

In order to establish a violation of section 5(a)(1), the Secretary must prove that:

> (1) the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm".

National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 (D.C. Cir. 1973). In this case, the record clearly establishes the second and third criteria listed above. As discussed more fully by Chairman Cleary in his initial decision, Continental recognized that the explosive vapors released by gasoline escaping from an overflowing tank posed a hazard to employees at its worksite. Indeed just a few months prior to the present tragedy, a storage tank at a nearby tank farm had overfilled and then erupted, killing one person. See Triangle Refineries, Inc., 73 OSAHRC

3/ Both members agreed with the Judge's conclusion that Continental did not violate the general duty clause for the other reasons alleged in the citation. The Secretary did not take exception to these aspects of the Commission's decision before the Sixth Circuit. Accordingly, we need consider only that allegation of the citation concerning the use of automatic detection devices or persons.

9/A14, 1 BNA OSHC 3050, 1971-73 CCH OSHD para. 15,454 (No. 1008, 1973)(ALJ). The record shows that Continental officials were well aware of the circumstances surrounding that explosion and knew that the neighboring storage tank farm, like its own, followed a procedure called "unmanned delivery" in filling its tanks. Additionally the record is uncontroverted that death or serious injury could result from the hazard created by an overflowing tank.[4/]

The only remaining question then is whether Continental rendered its workplace "free" of the hazard. The Secretary suggested a manned delivery procedure, coupled with the usage of high level alarms, to prevent massive overflows such as occurred here. As noted above Judge Patton vacated the citation, however, because such devices were not recognized by the industry as a necessity for safe operations.

In National Realty & Construction Co., supra, the court addressed the question of what an employer must do to render its worksite "free" of a recognized hazard. In addressing this duty, the court stated that the hazard must be one which is preventable and defined preventability as follows:

> This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Id at footnote 37, p. 1266.

4/ Respondent's company truck driver Douglas was exposed to the hazard when he drove up to the tank farm to load his delivery vehicle.

We adhered to this rationale in Southern Railway Co., 75 OSAHRC 88/C2, p.3, 3 BNA OSHC 1657, 1658, 1975-76 CCh OSHD para. 20,091 (No. 5960, 1975); wherein we stated, "Though the level of hazard recognition required by the 'general duty' clause is measured against industry employer knowledge....an abatement order under section 5(a)(1) may require that work practices and safety precautions be upgraded to a feasible level which is above that considered customary or 'reasonable' by an industry." (citations omitted) Southern Railway Co., supra, at 23,897.

The evidence of record, described by Chairman Cleary in the Commission's initial decision, establishes that a manned delivery system and high level alarms are reasonable and feasible methods of preventing tank spills. National Realty & Construction Co., supra, at 1266. Not only did Exxon, another company operating petroleum storage facilities, have high level alarms and follow the manned delivery procedure at one site, but the Secretary's area director, who had experience in the petroleum industry, as well as one of Continental's own witnesses recognized the safety utility of these controls. In such circumstances, we hold that the Secretary has demonstrated the feasibility of the suggested abatement method and affirm the citation.

The Secretary proposed a penalty of $700. We recognize the large size of the employer and the high gravity of the violation. The company, however, after the Triangle Refineries incident, had taken initial steps to increase safety at its facility. While these actions were inadequate, they demonstrate Continental's good faith. Kent Howlin Constr., Inc.,

77 OSAHRC 22/A2, 5 BNA OSHC 1051, 1977-78 CCH OSHD para. 21,550 (No. 9483, 1977), appeal filed, No. 77-1258 (10th Cir. April 18, 1977). We conclude that a penalty of $500 is appropriate.

The citation for a violation of section 5(a)(1) of the Act is affirmed and a penalty of $500 is assessed.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 20 1978

Commissioner COTTINE filing a separate opinion:

As a new member of the Commission, I must resolve the issue of my participation in pending cases. It is also necessary for me to set out the principles guiding my decision on this important issue.

In this case, Chairman Cleary and Commissioner Barnako reached a unanimous decision on the merits before I received by commission on May 1, 1978. A decision was already in preparation when I assumed office. I have concluded that the wisest exercise of discretion is to decline to participate in this case even though a new Commission member has authority to participate in pending cases. It should be emphasized that by declining to participate I express no opinion on the procedural or substantive issues in this case or on the appropriateness of the accompanying order.

Discretion of Commission Members

As a matter of law, it is not necessary for all Commission members to participate for an agency to take official action. In Drath v. FTC, 239 F.2d 452 (D.C. Cir. 1956), cert. denied, 353 U.S. 917 (1957), the Federal Trade Commission issued a cease-and-desist order with only three of its five members participating. The Court of Appeals rejected petitioner's contention that the FTC can act in its adjudicatory capacity only when all members participate, except when there is a vacancy. The court ruled that official action can be taken by the

majority of the requisite quorum. Also Frischer & Co. v. Bakelite Corp., 39 F.2d 247 (C.C.P.A. 1930), cited approvingly in FTC v. Flotill Prod. Inc., 389 U.S. 179, 182-183 (1967). Similarly, section 12(f) of the Occupational Safety and Health Act, 29 U.S.C. § 661(e), provides:

> For the purposes of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

Thus, the unanimous decision already reached in this case satisfies the quorum and official action requirements of the Act and my participation is not necessary for the Commission to carry out its adjudicatory functions in this particular case.

However, it is also settled that a new member of an administrative agency may participate in pending cases. For example, a new member of the Civil Aeronautics Board who had not participated in previous proceedings was entitled to vote and break an existing tie where he had familiarized himself with the record. Western Air Lines v. CAB, 351 F.2d 778 (D.C. Cir. 1965), citing United Air Lines v. CAB, 281 F.2d 53 (D.C. Cir. 1960). 1/ In United the court indicated that, where a member voting with the majority without hearing oral argument "had the record before him and the benefit of briefs", there was no abuse of

1/ A Commissioner may vote simply to avoid an impasse. Public Service Commission of State of N.Y. v. FPC, 543 F.2d 757, 777 (D.C. Cir. 1974). See generally Screws v. United States, 325 U.S. 91, 134 (1945)(Rutledge, J., concurring in result).

discretion in his participation. 281 F.2d at 56. There are numerous other cases supporting this holding. The clearest statement of law is set forth in Gearhart & Otis, Inc. v. SEC, 348 F.2d 798 (D.C. Cir. 1965):

> The decisions of numerous courts and administrative agencies establish that, even without agreement of the parties, a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him. [footnotes omitted]

348 F.2d at 802. 2/ See Au Yi Lau v. U.S. Immigration and Naturalization Service, 555 F.2d 1036, 1042 (D.C. Cir. 1977); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 182 & n.8 (2d Cir. 1976). Thus, a new member possesses the necessary authority to participate in all cases pending before the Commission on assuming office.

Though a new member may participate in all pending cases, particularly those involving an impasse, the decision remains a matter of discretion since adjudicatory decisions may be upheld on a majority of a quorum. In FTC v. Flotill Prod., 389 U.S. 179 (1967), rev'g 358 F.2d 224 (9th Cir. 1966), an FTC member appointed to fill one of two vacancies declined to participate because he had not heard the oral argument. Thus, three of the possible four Commissioners actually participated in the decision. As a result, the FTC issued a cease-and-desist order based on

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2/ The Court distinguished WIBC, Inc. v. FCC, 259 F.2d 941 (D.C. Cir.), cert. denied, sub nom. Crosley Broadcasting Corp. v. WIBC, Inc., 358 U.S. 920 (1958), because oral argument was statutorily required if a party requested it. 348 F.2d 798, 802 n. 14.

the affirmative vote of only two members. Despite its obvious impact on the number of members constituting a majority, the Court did not review the exercise of discretion by the new member. Instead, the Court accepted the abstention at face value and upheld the action of the two members of the FTC. See also LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966); Atlantic Refining Co. v. FTC, 344 F.2d 599 (6th Cir. 1965). In addition, administrative decisions involving two or more abstentions have been upheld by reviewing courts without question or comment on the grounds for these abstentions. All that was necessary to sustain the agency decision was a majority of the required quorum. E.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 848, 861 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

Decision Not to Participate

I decline to participate in this case because a majority of the Commission has reached agreement on the merits and my vote would have no effect on the outcome. Moreover, in cases where Chairman Cleary and Commissioner Barnako have reached a unanimous decision, my participation would delay the issuance of decisions and conflict with the goal of a prompt and efficient decision-making process. See generally Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 97 S.Ct. 1261, 1272 (1977); Keystone Roofing Co., Inc. v. OSHRC, 539 F.2d 960, 964 (3d Cir. 1976); Nader v. FCC, 520 F.2d 182, 205-207 (D.C. Cir. 1975), citing 5

U.S.C. § 555(b). Since abatement is stayed until the Commission enters a final order, 29 U.S.C. § 659(b), additional deliberations would delay the control of hazardous working conditions in any case where the Commission has determined that a violation of the Act exists. That result would be inconsistent with the statutory purpose to assure so far as possible safe and healthful working conditions for every working man and woman. 29 U.S.C. § 651(b).

I will, however, participate fully in all cases in which previous Commission deliberations have resulted in a one-to-one deadlock. Decisions by an equally divided Commission are without precedential value, e.g., Life Sciences Products Co., 77 OSAHRC 200/A2 (microfiche), 6 BNA OSHC 1053, 1977-78 CCH OSHD ¶ 22,313 (No. 14910, Nov. 11, 1977), appeal filed, No. 77-1014 (4th Cir. Jan. 6, 1978), and, therefore, do not serve as guidance to the Commission's administrative law judges. Moreover, these decisions also promote needless litigation in the U.S. Courts of Appeals to decide issues which should initially be determined by the Commission because its members have specialized training, education, and experience in occupational safety and health. 29 U.S.C. § 661(a). See generally Atlas Roofing Co. v. OSHRC, supra at 1264, 1272; Keystone Roofing Co., Inc. v. OSHRC, supra at 963-964. Administrative resolution of pending issues also promotes a more uniform application and development of occupational safety and health law. After reading the record, I will participate in the consideration and decision of these cases.

Conclusion

My decision not to participate in pending cases which have reached a unanimous decision by my colleagues, but to participate in those cases with unresolved issues, promotes the prompt adjudication of cases. The full benefit of Commission review is also assured the parties and the public. Both of these results are essential to protecting the lives, health and safety of American workers and the operation of American business while providing for the effective adjudication of cases by the administrative law judges.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 1829
CONTINENTAL OIL COMPANY, (SOUTHERN FACILITIES TERMINAL),	:	
Respondent.	:	

DECISION

Before MORAN, Chairman; and CLEARY, Commissioner.

CLEARY, Commissioner:

This case is before the full Commission on separate directions for review ordered by former Commissioner Van Namee and myself.

I directed review on the issue of: Does the evidence of record support the conclusion that respondent is in violation of section 5(a)(2) of the Act by failing to comply with the standard at 29 CFR §1910.106(b)(2)(vii)(b)(2).

Former Commissioner Van Namee ordered review on the issue of: Whether respondent's instructions regarding situations of the type evidenced by this case constituted compliance with the requirements of section 5(a)(1) in view of the industry's experience with the effectiveness of said instructions. That is, was this respondent on notice that its instructions were inadequate such that it violated section 5(a)(1)?

The orders to the parties invited them to file exceptions to the Judge's decisions on additional issues. The Secretary has excepted to the Judge's decision to the extent that it vacated citations.

The case arose as a result of a fire and explosion at the Chattanooga facility of the Continental Oil Company on September 25, 1972. One of the facility's six petroleum storage tanks overflowed, and spilled into a diked area surrounding the tanks. Continental's terminal manager, who attempted to stop the pipeline flow, was killed. Two employees of the Firestone Fire and Rubber Company working in a building adjacent to the facility were also killed.

Six citations were issued to Continental. These are summarized as follows:

Non-serious citation:

29 CFR §1910.106(b)(2)(vii)(c)(5). Failure to provide a drain of a uniform slope.

Serious citations:

Number 1. 29 CFR §1910.106(f)(8). Failure to provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank.

Number 2. 29 CFR §1910.106(b)(2)(vii)(b)(2). Failure to provide a drainage system.

Number 3. 29 CFR §1910.106(b)(2)(vii)(b)(3). Drainage from the diked area was discharged into adjoining property and public drains which emptied into natural watercourses.

Number 4. Section 5(a)(1) of the Act, the general duty clause. An employee was required to enter the terminal to work when vapor laden air was hazardous to the employee; remote devices were not provided to cut off the flow of gasoline; and automatic detection devices or persons were not employed to detect overflowing tanks.

Number 5. 29 CFR §1910.106(b)(2)(vii)(c)(7)(i). The diked area was not subdivided by drainage channels.

The cited standards are attached as an "Appendix A" to this decision. Judge Patton vacated all but serious citation No. 2.

THE FACTS

Continental's tank farm was serviced by Colonial Pipeline Company. Colonial had a centralized dispatching facility in Atlanta, Georgia, a pumping station near East Ridge, Georgia, and a local dispatching facility near Continental's tank farm. Continental employed its terminal manager to operate the tank farm. Colonial employed one dispatcher to operate the Atlanta facility, and a second dispatcher to operate the local facility.

Continental used a procedure called "unmanned delivery" in filling its tanks. The length of time necessary to fill the tank was calculated, and when the starting time was known the stopping time was determined. Because the filling would take several hours, the terminal manager could leave the terminal after the filling began and return before it ended.

The terminal manager started or stopped the pipeline flow by calling the local dispatcher. The local dispatcher coordinated the instructions with the Atlanta dispatcher. Having control over the entire system, the Atlanta dispatcher could start or stop the pipeline flow. A toll-free telephone number was provided to communicate with the Atlanta dispatcher. Both the local dispatcher and Continental's terminal manager had this number. Collect calls were also accepted. Once the Atlanta dispatcher was contacted, the pipeline flow could be started or stopped instantaneously. With this method of controlling the pipeline flow, manually operated valves were located at the terminal and the local dispatching facility. But these valves were not used in daily operations.

Continental provided safety instructions for its employees that included written "Emergency Procedures" concerning product leaks. Also Continental's district manager conducted a safety meeting that emphasized the methods of shutting off the pipeline flow in the event of spills or leaks, including calling the dispatchers. This meeting was held after a previous tank fire at Doraville, Georgia. See Triangle Refineries, Inc., No. 1008 (March 7, 1973) (Administrative Law Judge). Continental's terminal manager attended this safety meeting.

Before the explosion, the local fire department had been summoned to the tank terminal. The fire chief observed an unidentified man in a green worksuit, apparently the terminal manager, unlock the terminal gates, enter the terminal, and go toward the valve manifold. The chief told the unidentified man that he would have to wear self-contained breathing apparatus on account of the fumes. The man ignored the warning, and said he was going to shut off a valve. The chief and his assistant also entered the terminal, and the chief observed the overflow. He and his assistant then left the terminal, and subsequently the explosion occurred.

After the explosion, electric power failed at the local pipeline dispatching facility. Because of the power loss, a pressure regulator control valve at the local facility automatically closed. This valve was not a positive seal, and did not completely stop the pipeline flow. However, it considerably reduced the flow. Thereafter, the local dispatcher went to the terminal, and manually closed off the facility. The Atlanta dispatcher's ability to control the entire system and stop the pipeline flow after the power failure is unclear from the record.

THE DRAINAGE CITATION

Serious citation No. 2 alleged that Continental failed to provide a drainage system that terminated in vacant land or an impounding basin in non-compliance with the standard at 29 CFR §1910.106(b)(2)(vii)(b)(2). The Judge found that respondent did not provide a basin for drainage, and affirmed the citation.

The standards governing tank farms require that either of two methods be used to retain accidentally discharged liquids. Section 1910.106(b)(2)(vii)(a) states the following:

> §1910.106(b)(2)(vii) Drainage, dikes, and walls for aboveground tanks.
>
> (a) Drainage and diked areas. The area surrounding a tank or group of tanks shall be provided with drainage as in subdivision (b) of this subdivision, or shall be diked as in subdivision (c) of this subdivision, to prevent accidental discharge of liquid from endangering adjoining property or reaching waterways.

With drainage, drains surround the tanks to carry away spilled liquids to vacant land or an impounding basin. See 29 CFR §1910.106(b)(2)(vii)(b). With diking, a dike is built around the tank farm to retain discharged liquids within it. See 29 CFR §1910.106(b)(2)(vii)(c).

The Secretary concedes that an employer must comply with either the diking or the drainage standards, but not both. The Secretary argues that Continental failed to comply with both the

diking and the drainage standards. He argues that separate citations, some for non-compliance with the drainage standards and others for non-compliance with the diking standards, should be affirmed.

We reject the Secretary's argument. The standard requires either diking or drainage. To affirm citations alleging non-compliance with both the diking and the drainage standards, as urged by the Secretary, assumes that both diking and drainage are required. The assumption is erroneous because it ignores the alternative requirement of diking or drainage. When an attempt is made to comply with one method, a citation for not complying with the other method is an abuse of discretion.

Continental surrounded its tanks with a dike. The photographic evidence shows the dike; the witnesses referred to it; and the Secretary has referred to it in the citation, the complaint, and his brief. Thus, only the diking standards apply to Continental in this case, and compliance with the drainage standards is not required. Serious citation No. 2 alleged non-compliance with a drainage standard. It is therefore vacated.

Continental argues that the above-quoted standard at 29 CFR §1910.106(b)(2)(vii)(a) has no relationship to the health and safety of employees. I disagree. On October 10, 1972, the Secretary issued an interpretation of this standard. In this interpretation the Secretary acknowledges that the primary and express purpose of

t' s standard is to avoid harm to adjoining property and waterways. The interpretation is attached as "Appendix B." The Secretary's interpretation also states that any safety benefits to employees is secondary. In his argument before us, the Secretary notes the Directive's conclusion that each case "will be considered on its own merits," and he asserts that the merits of this case require compliance.

There is some doubt as to whether the Commission is empowered to consider the standard as being anything but what it purports to be on its face, an occupational safety and health standard issued under section 6(a) of the Act. See U.S. Steel Corp., Nos. 2975 and 4349 (November 14, 1974). But because of a lack of any judicial ruling in this regard and because of the Secretary's interpretation, I have considered the application of the standard in light of the record concerning its secondary purpose, protecting employees. One of respondent's witnesses testified that compliance would not benefit employee safety, while the compliance officer testified differently. The evidence does show clearly however that containment of a spill would confine the dangerous spilled product to one area. The containment would protect statutory employees generally outside of the containment area who may not be identifiable. Cf. Brennan v. O.S.H.R.C. & Underhill Constr. Corp., Nos. 74-1568 & 74-1579 (2d Cir., March 10, 1975). Thus compliance with the standard does beneficially serve employee safety.

FIRE CONTROL

Serious citation No. 1 charged Continental with failing to provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank. The cited standard states:

§1910.106 Flammable and combustible liquids.

* * *

(f) Bulk plants.

* * *

> (8) Fire control. Suitable fire-control devices, such as small hose or portable fire extinguishers, shall be available to locations where fires are likely to occur. Additional fire-control equipment may be required where a tank of more than 50,000 gallons individual capacity contains Class I liquids and where an unusual exposure hazard exists from surrounding property. Such additional fire-control equipment shall be sufficient to extinguish a fire in the largest tank. The design and amount of such equipment shall be in accordance with approved engineering standards.

The Judge vacated this citation because fire control equipment sufficient to extinguish a fire in Continental's largest tank did not exist, and therefore compliance would be an impossibility.

The Secretary excepts to the Judge's finding arguing that evidence of fixed foam protection systems was not properly considered by the Judge.

At the hearing, the Secretary's attorney read from the Fire Protection Manual published by the National Fire Protection Association. The excerpts he quoted concerning foam discharge outlets on the tanks, fixed piping and pumps for the outlets, and a central foamhouse or connections for external foam generators a safe distance from the tanks, were admitted into evidence. I consider this evidence adequate to show that equipment sufficient to extinguish a fire in the largest tank does exist. See also 7 National Fire Protection Association, National Fire Codes, Alarm & Special Extinguishing Systems, pp. 11-32 to 11-42, §§301-356 (1972-73). I agree with the Secretary that compliance was possible.

I would vacate this citation, however, because additional equipment sufficient for a fire in the largest tank was not required in the standard. The standard is basically a regulatory rule of reason. It requires "suitable fire control" for small fires, and provides additional equipment "may be required" if an "unusual exposure hazard exists from surrounding property." The Secretary contends that freight trains loaded with TNT passing the tank farm and airplanes flying overhead were unusual exposure hazards. The contention goes against the weight of the evidence as to the difficulty in detonating TNT. Airplanes flying overhead do not pose a hazard "from surrounding property" under the standard.

DRAINAGE FROM DIKED AREAS

Non-serious No. 1 alleged that Continental failed to provide a drain of not less than one percent away from the tank toward a sump, drain box, or other safe means of disposal in non-compliance with the standard published at 29 CFR §1910.106(b)(2)(vii)(c)(5). It was stipulated that Continental provided a drain with a slope of approximately two percent away from the tank. In excepting to the Judge's finding on this item the Secretary asserts that Continental failed to provide a sump or other means of disposal.

The compliance officer testified that he did not see a sump, drain box or other means of disposal. Continental's general manager of operations, however, testified that a sump or low point was located within the diked area. The working drawings of Continental's terminal show the existence of a low point or sump in one corner of the diked area. The photographic evidence also shows that the liquids within the diked area accumulated in the sump area. Weighing the evidence, we find that Continental provided a sump as required by the cited standard.

The Secretary also contends that location of a sump within the diked area "aggravates the hazard and hardly constitutes a safe means of disposal since the gas is pooled around the tanks, thereby enhancing the danger of an expanding fire and explosion." In other words, the Secretary argues that the sump should have been located outside of the diked area. The cited standard, however, requires only that it be located, "at the greatest practical distance from the tank." Continental has located the sump at one corner of the diked area. To have the sump beyond the diked area would create an area having a wider dispersion of flammable liquids. Continental's placement of the sump was as far as practical from the tanks under the circumstances.

The vacation of non-serious No. 1 is therefore affirmed.

DRAINAGE CHANNELS WITHIN THE DIKED AREA

Serious citation No. 5 alleged that the diked area was not subdivided by drainage channels or intermediate channels in non-compliance with the standard published at 29 CFR §1910.106(b)(2)(vii)(c)(7)(i). Continental admitted that it did not provide intermediate curbs, hence the issue is whether the diked area was subdivided by drainage channels.

The construction drawings for the terminal included drainage channels within the diked area. The compliance officer testified, however, that in inspecting after the fire, he did not find any drainage channels. There was a possibility of erosion and washing of the ditches as a result of water and foam used to extinguish the fire. The Judge found the existence of the ditches from his examination of an aerial photograph of the terminal. The construction drawings show a plan for the inclusion of

the channels within the diked area. The aerial photograph suggests that the plan was executed in this respect. We therefore agree with the Judge that the preponderance of the evidence does not show an absence of the drainage channels. The vacation of serious citation No. 5 is affirmed.

THE "GENERAL DUTY" CITATION

Serious citation No. 4 alleged that respondent violated section 5(a)(1) of the Act, the "general duty" clause. The complaint described the alleged violation as follows:

> (1) Employee was required to enter the premises of said terminal to work where vapor laden air was hazardous to the employee.
>
> (2) Remote devices were not provided for cutting off gasoline pumps in emergency conditions and
>
> (3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

The Judge vacated this citation. I would affirm this citation while Chairman Moran would agree with the Judge's disposition. Inasmuch as this case has been before the Commission for over 1 1/2 years, the Commission has agreed to decide it at this time, rather than delaying the disposition until a third member is appointed to the Commission.

Accordingly, the Judge's vacation of this citation is affirmed by an equally divided Commission. This portion of our decision has no

precedential weight. Neil v. Biggers, 409 U.S. 188 (1972). My views on this issue follow. I would also add that the Judge's decision correspondingly has little precedential value because of the unique facts and I have the hope, if not the expectation, that the employer will take voluntarily the corrective measures that I suggest in this opinion.

Chairman Moran's views are stated in his concurring opinion.

In order to find a violation of the general duty clause:

> [T]he Secretary must prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm."

National Realty & Constr. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1265 (D.C. Cir. 1973). A violation occurs whenever an employer fails to take reasonable precautionary steps to protect his employees from reasonably foreseeable recognized hazards. Brennan v. O.S.H.R.C. & Vy Lactos Laboratories, Inc., 494 F.2d 460, 463 (8th Cir. 1974); cf. National Realty, supra at 1265, n.34.

Actual knowledge on the part of an employer of a hazard causing or likely to cause death or serious physical harm, however, is sufficient to find that the hazard is a "recognized hazard." Vy Lactos Laboratories, supra. If an employer fails to render a workplace free of a generally known and recognized hazard of a particular industry, a violation of the general duty clause will also be found. American Smelting & Refining v. O.S.H.R.C., 501 F.2d 504 (8th Cir. 1974). In any event, the standard used in determining the existence of a recognized hazard would be "the

knowledge of safety experts who are familiar with the circumstances of the industry or activity in question." National Realty, supra at 1265, n.32.

Continental argues that there is no proof that a recognized hazard exists when petroleum products spill or leak near large storage tanks. I disagree. Continental's "Emergency Procedures" refer to a spill as a hazard, and Continental concedes that the vapor caused by a spill is a hazard. Many of the safety precautions taken by the petroleum industry are directed toward preventing or working safely with leaks or spills. For instance, Continental's "Product Terminal Operating Procedure Guide" instructs employees at tank car loading racks to "use extreme caution in moving about where the product has been spilled." Continental's "Emergency Procedures" are also written to instruct employees in handling product leaks. Furthermore, it is evident from Continental's safety meeting after the Doraville fire that it had actual knowledge that tank spills were hazards likely to cause death or serious physical harm, further evidence of a recognized hazard.

Concerning the likelihood of serious physical harm, Judge Patton stated:

> There is no question that it is recognized that fuel escaping from a storage tank is a very real and definite hazard. Statistics introduced in evidence established that there are approximately three and one-half fatalities for every fire of this nature which has occurred.

I agree with the Judge and would find that death or serious physical harm are likely to result from a spill.

The remaining question is whether Continental took reasonable precautionary steps to protect its employees from the recognized hazard. I will consider this question under the factual allegations of each numbered paragraph of the citation.

Paragraph (1)

The Secretary alleged that the terminal manager was "required" to enter the terminal and shut off the manually operated valves in violation of section 5(a)(1) of the Act. The Secretary notes that Continental's "Emergency Procedures" state "Isolate the hazard as much as possible by closing valves. . ." and "locate the source of the leak and . . . stop the flow of product if safely possible." He also notes that the procedure of telephoning the pipeline dispatchers with a request that they shut off the pipeline flow was not in the written "Emergency Procedures." The Secretary argues from these facts that the emergency procedure was to close the manual valves and not to telephone the pipeline company. I disagree.

Continental's "Emergency Procedure" states:

> Some of the points listed below will apply to some instances and not to others. These are only guidelines. They are not absolute (emphasis added).

Additionally, Continental's terminal manager was familiar with the emergency procedures. He had 13 years' experience as a pipeline dispatcher and terminal operator, and he attended the safety meeting emphasizing the procedure of calling the Atlanta dispatcher.

Continental's emergency instructions contained reasonable precautionary steps designed to stop the pipeline flow after a spill. The Secretary argues that the terminal manager had no choice but to enter the terminal to stop the pipeline flow. This argument is not supported by the evidence of record. The explosion occurred at 6:38 a.m., and the power failed at the local pipeline dispatching facility at 6:40 a.m. Earlier, telephone and electric power service were operational, and the Atlanta dispatcher had full control of the system. The terminal manager could have called either the Atlanta dispatcher or the local dispatcher, as he had been instructed. In short, I do not find that the terminal manager was "required" to enter the terminal as alleged, nor do I find that Continental failed to act reasonably in instructing its employees how to handle safety tank spills. The citation alleging a violation of section 5(a)(1) of the Act cannot be affirmed on the allegations contained in subsection (1) of the citation.

Paragraph (2)

The Secretary asserts that "Remote devices were not provided for cutting off gasoline pumps in emergency conditions."

It is not clear what kind of remote shut-off devices the Secretary considers necessary. Testimony was presented that remote devices could be triggered either by high level alarms on the tanks or by vapor-sensing devices within the terminal. Testimony was also presented that the signal generated by these devices could be used to activate shut-off valves at any place or alarms at the Atlanta dispatching facility.

Also, the Secretary has not commented on evidence that if the valves were closed they could cause pipeline ruptures. The pipelines operate at a pressure of 2,000 pounds per square inch, and it is understandable why a sudden valve-closing could cause ruptures. The possibility of ruptures places in doubt the reasonableness of "emergency remote control valves." The evidence does not demonstrate that they are a reasonable and acceptable method of preventing tank spills.

Additionally, the Secretary has not presented sufficient evidence to demonstrate the reasonableness of remote controlled signals to the central pipeline dispatching facility. Insufficient evidence has been presented as to the method of installation, such as by telephone lines or radio circuits. Accordingly, I conclude

that the proof in support of paragraph (2) is insufficient.

Paragraph (3)

Paragraph (3) alleged that Continental failed to use automatic detection devices or persons to detect the overflow. During the hearing the Secretary referred to automatic detection devices as either high level alarms that would signal the full state of a tank, or vapor-sensing devices that would signal the presence of a high vapor level. Continental had neither of these devices.

The evidence shows that vapor-sensing devices are usually used in enclosed areas and that they would not be reliable at a tank terminal because of the changing atmospheric conditions. Due to winds, rain, snow, and fog these devices may fail to detect any vapors present. One of respondent's witnesses, who had designed 25 terminal facilities, testified that even with 100 of these devices present at a tank terminal he would not depend upon their reliability. The Secretary has not met his burden of proof in showing that these devices would be an effective method of aiding in the prevention of overflows.

The Secretary has proved a "general duty" clause violation, however, under the theory that Continental failed to use high level alarms and failed to follow a manned delivery procedure, that is, a procedure under which an employee is present at all times during

a pipeline delivery. 1/ Proof that other employers use safety measures advocated by the Secretary as methods of preventability is strong evidence that these methods are demonstrably feasible and usable measures necessary to prevent human error or hazardous conduct by employees. A superintendent of the Exxon Company testified that Exxon had high level alarms at Chattanooga, Birmingham, and Knoxville. He also testified that a manned delivery procedure was followed at the Exxon Chattanooga terminal for safety as well as quality control. The Secretary's area director had experience in the petroleum industry, and considered manned delivery procedures and high level alarms necessary for safety reasons. Furthermore, one of Continental's witnesses, a safety engineer, testified that when high level alarms are used, "It is a fail-safe operation if they've got personnel there. . . ." Thus it is clear that high level alarms, together with a manned delivery procedure constitute feasible methods to prevent tank spills. These methods of

1/ Although the pleadings in paragraph (3) alleged a failure to use automatic detection devices or persons to detect the overflow, I believe that the case was tried under the theory that the conjunctive "and" instead of "or" was intended. High level alarms would be useless in an unmanned delivery operation because nobody would be present to hear the alarm.

preventability are reasonable precautionary steps that would protect employees from the recognized hazard of tank spills. I believe that it is imperative that employees be protected by these methods in order to assure "so far as possible" the safe working conditions that Congress intended in passage of the Act. See section 2(b) of the Act; Brennan v. O.S.H.R.C. & Hanovia Lamp Div., Canrad Precision Indus., 502 F.2d 946 (3d Cir. 1974); REA Express, Inc. v. Brennan, 495 F.2d 822 (2d Cir. 1974).

The Judge, however, did not apply the "general duty" clause for essentially three reasons: (1) the affirmance of a general duty citation would be improper because the Commission would in effect be promulgating a standard (pages 33-34, 36); (2) the absence of high level alarms, together with Continental's unmanned delivery procedure was not a "recognized hazard" (page 37); and (3) that, although some companies do have high level alarms and some companies do follow a manned delivery procedure, a majority of companies in the industry do not (pages 35-36).

The "general duty" clause provides protection under the Act when safety standards have not been adopted. Brennan v. O.S.H.R.C. & Interstate Glass Co., 487 F.2d 438, 439 (8th Cir. 1973). The Secretary cannot be expected to adopt safety or health standards for every conceivable hazardous employment situation. The Judge's conclusion

that the application of the general duty clause in this case is in effect an adoption of a regulatory standard is plainly wrong. This is adjudication under a broad legislative standard to be sure. But it is not administrative rulemaking. See Brennan v. O.S.H.R.C. & Hanovia Lamp Div.,Canrad Precision Indus., supra at 950-951; cf. American Smelting & Refining, supra at 511-512; see also K. Davis, Administrative Law Text, §5.03 at 126-31 (3d ed. 1972).

Also, the Judge erroneously assumed that the absence of methods of prevention, i.e., manned delivery procedures together with high level alarms, must by itself constitute a "recognized hazard." See page 33 of his decision. A "recognized hazard," however, is one thing, and a lack of methods of prevention is another. In this case, it was proved that a tank spill is a "recognized hazard." It was also proved that the Continental facility lacked the methods of prevention urged by the Secretary. The Secretary proved that these methods were reasonable and feasible in preventing tank spills. He has met his burden of proof. National Realty, supra.

Finally, it is not necessary that a majority of employers follow methods of prevention advocated by the Secretary before a "general duty" violation can be found. It is only necessary that these methods be reasonable. Vy Lactos Laboratories, supra.

Accordingly, serious citation No. 2 is vacated. The Judge's decision is affirmed in all other respects.

FOR THE COMMISSION

William S. McLaughlin
Executive Secretary

DATED: JUN 9 1975

APPENDIX A

§1910.106 Flammable and combustible liquids.

* * *

(b) Tank storage.

* * *

(2) Installation of outside aboveground tanks.

* * *

(vii) Drainage, dikes, and walls for aboveground tanks.

(a)The area surrounding a tank or a group of tanks shall be provided with drainage as in subdivision (b) of this subdivision, or shall be diked as provided in subdivision (c) of this subdivision, to prevent accidental discharge of liquid from endangering adjoining property or reaching waterways.

(b) Drainage. Where protection of adjoining property or waterways is by means of a natural or manmade drainage system, such systems shall comply with the following:

* * *

(2) The drainage system shall terminate in vacant land or other area or in an impounding basin having a capacity not smaller than that of the largest tank served. This termination area and the route of the drainage system shall be so located that, if the flammable or combustible liquids in the drainage system are ignited, the fire will not seriously expose tanks or adjoining property.

(3) The drainage system, including automatic drainage pumps, shall not discharge to adjoining property, natural water courses, public sewers, or public drains unless the discharge of flammable or combustible liquids would not constitute a hazard, or the system is so designed that it will not permit flammable or combustible liquids to be released.

(c) Diked areas. Where protection of adjoining property or waterways is accomplished by retaining the liquid around the tank by means of a dike, the volume of the diked area shall comply with the following requirements:

* * *

(5) Where provision is made for draining water from diked areas, drainage shall be provided at a uniform slope of not less than 1 percent away from tanks toward a sump, drainbox, or other safe means of disposal located at the greatest practical distance from the tank. Such drains shall normally be controlled in a manner so as to prevent flammable or combustible liquids from entering natural water courses, public sewers, or public drains, if their presence would constitute a hazard. Control of drainage shall be accessible under fire conditions.

* * *

(7) Each diked area containing two or more tanks shall be subdivided preferably by drainage channels or at least by intermediate curbs in order to prevent spills from endangering adjacent tanks within the diked area as follows:

(1) When storing normally stable liquids in vertical cone roof tanks constructed with weak roof-to-shell seam or approved floating roof tanks or when storing crude petroleum in producing areas in any type of tank, one subdivision for each tank in excess of 10,000 bbls. and one subdivision for each group of tanks (no tank exceeding 10,000 bbls. capacity) having an aggregate capacity not exceeding 15,000 bbls.

* * *

(f) Bulk plants.

* * *

APPENDIX A

(8) Fire control. Suitable fire-control devices, such as small hose or portable fire extinguishers, shall be available to locations where fires are likely to occur. Additional fire-control equipment may be required where a tank of more than 50,000 gallons individual capacity contains Class I liquids and where an unusual exposure hazard exists from surrounding property. Such additional fire-control equipment shall be sufficient to extinguish a fire in the largest tank. The design and amount of such equipment shall be in accordance with approved engineering controls.

* * *

INTERPRETATION

October 10, 1972

STANDARD PROVISION: 29 CFR 1910.106(b)(2)(vii)

SUBJECT: Drainage, Dikes, and Walls for Aboveground Tanks

1. Purpose. To clarify the applicability of 1910.106(b)(2)(vii) and to direct answers to inquiries.

2. Background. This paragraph establishes the requirements for drainage facilities or dikes for the area surrounding aboveground flammable liquid storage tanks. Numerous requests for clarification, objections to, and informal petitions for deletion of the subject requirement have been received on the basis that it is concerned primarily with public safety and property damage and not employee safety.

3. Interpretation. The primary and expressed purpose of the standard, is to avoid harm to adjoining property and to waterways. Any resulting benefit to the safety and health of employees appears to be secondary. Therefore, paragraph 1910.106(b)(2)(vii) is not intended to apply where its requirements do not have a substantial relationship to the safety and health of employees. Each case will have to be considered on its own merits.

MORAN, Chairman, Concurring:

I concur in vacating the citation for a violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(2) for the reasons stated by Commissioner Cleary. I would affirm Judge Patton's decision in all other respects, including his disposition of the alleged violation of the general duty clause, 29 U.S.C. § 654(a)(1), for the reasons given in his decision. In addition, however, I note that the Judge's vacation of the alleged violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(3) is warranted for the same reasons that Commissioner Cleary gives for vacating the alleged violation of 29 C.F.R. § 1910.106(b)(2)(vii)(b)(2).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30309

OSHRC EXECUTIVE SECRETARY

JUDGE'S DECISION REC'D AUG 10 1973

FINAL ORDER ON SEP 10 1973

SECRETARY OF LABOR, Complainant,	OSHRC Docket
v.	No. 1829
CONTINENTAL OIL COMPANY, (SOUTHERN FACILITIES TERMINAL), Respondent.	

DECISION

This case is before John S. Patton, the undersigned Administrative Law Judge on the complaint of the Secretary of Labor, United States Department of Labor, hereinafter referred to as complainant, against Continental Oil Company, Southern Facilities Terminal, hereinafter referred to as respondent, alleging that respondent, on or about September 25, 1972, was in violation of the Occupational Safety and Health Act, hereinafter referred to as the Act. It was alleged that respondent violated sections 5(a)(1) and 5(a)(2) of said Act and violated Occupational Safety and Health Standards 29 CFR 1910.106(b)(2)(vii)(c)(5), 29 CFR 1910.106(f)(8), 29 CFR 1910.106(b)(2)(vii)(b)(2), 29 CFR 1910.106(b)(vii)(b)(3) and 29 CFR 1910.106(b)(2)(vii)(c)(7)(i). The case come on for hearing before John S. Patton, the undersigned Judge, in Chattanooga, Tennessee, on April 24, 25 and 26, 1973.

Mr. Frank Steiner appeared as counsel for the complainant and Mr. R. Allan Edgar, appeared as counsel for the respondent. There was no motion to intervene.

LAW AND ISSUES IN THE CASE

It was alleged in the complaint as follows:

The respondent violated standard 29 CFR 1910.106(c)(2)(vii)(c)(5) in that respondent did not provide a drain with a uniform slope of not less than one per cent away from tank toward a sump drain box or other safe means of disposal to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains.

The respondent violated standard 29 CFR 1910.106(f)(8) in that respondent did not provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank where Class I liquids were stored in amounts greater than 50,000 gallons and unusual exposure hazards existed from surrounding property.

The respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(2) in that it did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

Respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(3) in that it permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining

property and public drains which emptied into natural water courses and did not provide a system that would not permit flammable or combustible liquids to be released.

Respondent violated Public Law 91-596, 91st Congress, S. 2193 December 29, 1970, Section 5(a)(1) in that it failed to furnish its employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee, a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to its employees in that:

1. Employee was required to enter the premises of said terminal to work where vapor laden air was hazardous to the employee.

2. Remote devices were not provided for cutting off gasoline pumps in emergency conditions and,

3. Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

Respondent violated standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) in that diked area containing approximately six (6) tanks was not subdivided by drainage channels or intermediate curbs in order to prevent spills from endangering adjacent tanks within the diked area and reduce surface for vaporization of flammables.

EVIDENCE IN THE CASE

It was admitted in the answer of respondent that respondent is a corporation having its principal office at Ponca City, Oklahoma, and maintaining a place of business at Chattanooga, Tennessee, for the receiving, storing and delivery of petroleum products. It was admitted at said place of employment in Chattanooga, Tennessee, respondent regularly employs employees who are engaged in handling, transporting, storing and receiving of petroleum products, substantial quantities of which are transported, shipped and delivered across various state boundries. It was stipulated that by reason of said activities, respondent is an employer engaged in a business affecting commerce within the meaning of section 3(a) of the Act and is subject to the jurisdiction of the Occupational Safety and Health Review Commission.

A stipulation was entered into by the parties prior to the hearing which stipulation was covered by a pre-trial order. Said stipulation provided that on September 25, 1972, gasoline from a pipeline flowing into a tank of respondent overflowed the tank, spilling gasoline on to the ground. A fire and explosion ensued as a result of which Mr. Don L. Ross, an employee of the respondent, was severely burned and died. Two employees of Firestone Tire and Rubber Company in said company's building near respondent's premises were killed in an explosion which resulted from ignition of vapors in the Firestone building.

The respondent had six petroleum storage tanks on said premises at the time of said fire and explosion and it was stipulated that the largest of said tanks was what is known in the industry as a nominal 55,000 barrel tank with an actual capacity of approximately 52,000 barrels. The largest tank did not catch fire at the time of said incident. It was stipulated that what is known as Class I liquids were stored in respondent's tanks. At the time the tank was being filled, and said spillage and fire resulted, the respondent did not have an employee at the tank overseeing the filling of said tank.

It was stipulated that respondent provided a drain with the uniform slope of approximately two percent away from the tank and it was admitted by complainant that said slope meets the requirements of the standard. It was stipulated that respondent is not required to comply with both standards 29 CFR 1910.106(b) and 29 CFR 1910.106(c), but that if the respondent has complied with either of the subsections of said standard, the respondent is not in violation of standard 29 CFR 1910.106. In other words, the respondent is required either to have a proper drainage system or to have proper diking but not to have both. It is the position of the respondent that it complied with both standards and the position of the complainant that the respondent complied with neither standard.

There was considerable evidence introduced as to the drainage provided by the respondent. Mr. Laury K. Weaver, Jr., compliance officer with the complainant, testified that he found no drainage channels or curbes subdividing between the tanks to prevent spills from endangering adjacent tanks within the diked area (TR 232), and that he found no evidence of a sump (TR 233, 234). He stated there was no drain box (TR 234). A drawing was introduced as Respondent's Exhibit 19 through Mr. Joseph Laskosky, General Manager of Operations for the respondent. Mr. Laskosky had been with the respondent approximately 14 years. He is a graduate petroleum engineer having graduated from the University of Oklahoma and having spent 21 years in the petroleum industry; three and one-half years in refining both as a laboratory technician and refinery operator; approximately three and one-half years in petro chemicals as an operator in an ethylene plant. He had also worked as a project engineer. He was involved in the design and construction of the Bethany Missouri Terminal. He became a senior staff engineer in the organization in charge of all pipeline and terminal construction. He was assistant district manager of a subsidiary named Cherokee Pipeline Company. He served in headquarters as manager of project research, which involved the study of transfer through pipelines of exotic materials such as coal, phosphate, rock amonia and other unconventional products. He later became general manager of planning, evaluation and research. In his present capacity, he

is in charge of all operations of respondent's pipelines, terminals, design and engineering, construction of the facilities and revamping of its existing facilities. The company operates 10,000 miles of pipeline and approximately 60 terminals. He is on the committee of static measurment of the American Petroleum Institute. Approximately 25 facilities have been designed and constructed under his supervision. He pointed out in his testimony that Respondent's Exhibit 19 shows elevation inside the dike area where a new tank was to be built with contours of existing drain inside terminal and channels to be built around the tank. He introduced Respondent's Exhibit 20 to be identified as a drawing of original construction. He stated that it showed, among other things, drainage channels which he stated were shown to be two feet in diameter, one foot in depth, cut into a V and located around the perimeter of the tank's bottom (TR 538, 539, 540). He stated these were very typical of drain ditches elsewhere. Exhibit 21 was introduced as showing drainage channels to be built around the last tank built (TR 541, 542). Respondent's Exhibit 22 was identified as showing additional earth work to accept the sixth tank (TR 542, 543). Drainage facilities were provided according to the witness for new facilities as well as the old (TR 545). The witness stated, however, that he had not, prior to the fire, personally inspected the construction of this drainage but only knew that it was authorized and that the plans as introduced into

evidence through exhibits called for this work to be done. He stated he had no reason to assume that it had not been done. A photograph was introduced in evidence on which Mr. Laskosky made markings of what he stated were drainage ditches (Respondent's Exhibit 23).

Mr. Weaver testified that respondent had a drain at the southeast corner which drained into a public drainage ditch running along side the spur railroad tracks just south of the respondent's facility (TR 222). He stated that the ditch ran into a waterway approximately 300 yards distance (TR 222). A photograph of the area was introduced into evidence as joint Exhibit 2 (TR 222). The area of the ditch running into the waterway was marked on said exhibit. He testified that there was water in the ditch as well as in the diked area at the time of the accident. He stated this drainage came out of the diked area as reflected in the southeast corner of a photograph introduced into evidence as Exhibit 23. The drainage ditch was described as approximately two feet wide (TR 224) and was 30 to 40 feet long. He did not find any impounding basin and capacity not smaller than that of the largest tank and did not find vacant land for drainage having capacity not smaller than the largest tank (TR 22). Mr. Laskosky testified that there was a pipe drain with closture end 4 x 100 slope through the dike. Such drain was in the corner of the property. The pipe drain

was opened only when an employee was in attendance. It was ordinarily opened to drain rainwater from the terminal dike area and other water that could be accumulated inside the dike area to the tanks themselves. Mr. Laskosky further pointed out that Respondent's Exhibit 22 shows a slope of approximately three to four feet from the south corner of the property to the north corner of the property where the dike drain exists. He stated that the slope was greater than the one per cent requirement. The addition of new tanks did not disturb the drainage. He testified that the plans had been submitted to the construction engineering committee as well as a competent engineer from the electrical field (TR 548). He stated that over a period of time drainage ditches can be eroded (TR 571). The water and foam applied at the time of the fire could have caused considerable erosion of the ditches (TR 532).

A sump was defined by Mr. McKenna, a safety engineer, as a low part of the dike where the water would collect from rain water after a rain or any time. He stated it is necessary to open a valve and let the water out (TR 400). As above stated, Mr. Weaver testified he found no evidence of the sump (TR 233, 234). On the other hand, Mr. McKenna testified that he did observe a sump (TR 399, 400). Mr. Laskosky defined a sump as a low point or depression (TR 537) and stated that a sump was located within the diked area and that Exhibit 17 reflected it in the upper right hand corner of the property

inside of the diked property adjacent to the drain pipe (TR 537).

There was also considerable evidence relating to the dike on the respondent's premises. Mr. McKenna testified that there was proper diking (TR 419). He stated that if the tanks had been separated by diking the dikes would have to be 18 inches. He stated that standard draining channels are preferable to dikes (TR 401). This is true he stated because intermediate curves or dikes can impound the liquid around the tank (TR 401). He stated that if flammable water or foam are floating around in the diked area, compliance or non-compliance with the standard would not have a substantial relationship to the welfare of employees (TR 402). It was stipulated that the diked area at the time of the accident was sufficient to sustain the spill from the largest tank (TR 431). Respondent's Exhibits 17 and 18, introduced by Mr. Laskosky showed the specification for tank beds and tank dikes (TR 534) as well as original specifications for the diked area (TR 533). Respondent's Exhibit 20 also covered the diking.

There was some fire beyond the diked area. A moving picture film taken by the local television station at the time of the fire was introduced into evidence and made a part of the record. This film reflected some fire beyond the dike area. Mr. Jack Shakleford, a reporter for the Chattanooga News Free Press, Mr. Tommy Easton, news photographer for the television

station and Mr. Jerry W. Evans, arson investigator, all testified that there was fire outside the dike (TR 110, 122, 203). Mr. Eason stated that the fire was burning intensely inside the dike but only a small fire outside the dike (TR 110). On the other hand, Mr. Evans testified that the area outside the dike was "burning pretty intensely" (TR 203). Mr. Evans testified that he did not know whether the fire was caused by fluids coming over or under the dike (TR 207). Mr. Weaver stated that there was considerable evidence of scorched ground outside the dike area in areas other than where the drain was (TR 243). Mr. Weaver stated that vapor could have saturated the grass and whatever might have been in the ditch thereby causing the burning. (TR 244). Patrolman Elbe stated that fumes were so thick that it caused his car to flood and die out and he had to stand upon the hood of the car to get some air (TR 145, 146). Mr. Carlyle Bunn, safety engineer with the Department of Labor, testified that the fire outside the dike could not be caused by brush fire but could be caused by petroleum fire; that the heavy black smoke and rolling flame were evidence of petroleum fires (TR 291, 292). On the other hand, Mr. John K. Parsons, safety engineer who is area director for the complainant in New Orleans, stated that petroleum was not the only thing that would have black smoke when it burned (TR 358, 359). He stated that anything with high carbon content would burn (TR 359). Mr. Jack Walker, district manager for Southern Facilities, with 26

years experience in the petroleum industry testified that vapors could have caused the burning outside the dike (TR 464). Mr. McKenna testified that vapor got in the Firestone plant and during the flash ignition, the building exploded (TR 427). Mr. Walker stated that he did not think it was petroleum burning in the ditch because the petroleum would cause more intense fire (TR 463). Mr. McKenna stated that the more vapor given off the more hazardous the condition (TR 417). Mr. Eason testified that although the fire inside the dike continued for considerably longer, the fire outside the dike was extinguished by 10:00 a.m. of the morning of the fire (TR 113). The fact that the fire outside the dike was out by 10:00 a.m., was not contradicted by any witness.

It was shown by joint Exhibit No. 3 and the testimony of Mr. Walker (TR 459, 459), that at the two point A's, respondent had 150 pound wheel dry chemical extinguishers, at point B they had a 30 pound rack mounted on poles, dry chemical fire extinguisher. In the shop, they had a 20 pound mounted extinguisher. At point C, at the end of the truck loading rack, they had a 20 pound mounted extinguisher; point D had a 5 pound CO2 unit carbon dixoide. They also had another CO2 extinguisher inside the laboratory area, there being two of them.

It was testified by Mr. McKenna that a good many of the pipeline terminals don't have water facilities and that they cannot expect to have foam protection without water. He stated that there

is no guarantee that equipment exists that would put out a fire in the largest tank that respondent had. Mr. Harold Purcell, plant manager for Shell Oil Company, having five light oil plants and two heavy oil plants under his supervision, testified that Shell Oil Company did not have equipment that would extinguish fire in a 40,000 to 45,000 barrel tank. He stated that he knew of no terminal that had such equipment and was not familiar with such equipment (TR 158). He stated that Shell Oil Company has an automatic sprinkler on the loading platform as part of the fire equipment, and has dry chemicals on the property to put out a fire (TR 170). Mr. McKenna stated that there is no guarantee that equipment exists that would put out the fire (TR 409), but it depends on variables, the amount of preburns, liquid in tanks, capacity of personnel, quality of extinguishing agent, etc. (TR 409). He stated that you fight fire with chemicals not water (TR 421). He stated it is safer if foam can be put over it (TR 421). Mr. Weaver testified that the fire equipment of respondent was not adequate to put out a fire (TR 217).

The respondent had a valve at the manifold for turning off the flow of petroleum. It was testified by Mr. Weaver and admitted by the respondent that there was no remote valves device to stop the flow of petroleum to the tanks (TR 231). Mr. Weaver testified that the gate would be a good place to put a cut off valve (TR 261). He stated it could be at the north corner of the facility (TR 262). He

stated he checked to see if other companies had remote cut off valves and only found such at Colonial Pipelines (TR 262). However, he did not inspect the other facilities but he inquired receiving negative answers (TR 266). Mr. Teddy L. Barnett, area manager for Colonial Pipeline Company testified that he is not familiar with any duplicate set of valve arrangements within the pipeline industry. He stated that it is fairly standard procedure to have a valve on the tank and a valve at the manifold (TR 72, 73). He stated some places have valves inside the dikes, some further away and some are the same as Southern Facilities (TR 83). He stated all these are hand operated valves. He stated that he has a remote device where he can turn off valves at the pumping station and there is no engineering reason why this could not be used at tank farms (TR 83). Mr. Purcell testified that at Shell Oil Company there is a dike between the storage tank and the valves (TR 169). Mr. W. J. Jackson, superintendent of Exxon Company Chattanooga, Tennessee, testified that Exxon does not have remote valves but only on the tanks themselves (TR 189). Mr. Bunn testified that emergency remote controls are frequently provided for valves or pumps. Other remotely controlled valves are installed for normal operating procedure and can frequently be used during fire emergency procedures to control or stop the flow of liquid (TR 316). He stated valves are available which slow automatically if subjected to fire conditions (TR 316). Mr. Parsons testified that if respondent

had had remote control devices at the gate or other locations, Mr. Ross might have had a chance; that running into an area with so much fumes he could have very easily lost conciousness before the explosion (TR 336, 337). It was stated that when they lose power, the valve automatically goes closed. In the case at bar, this happened although it did not completely close but substantially restricted the flow (TR 88, 89). Loss of power may be cut automatically to less than 250 barrels per hour (TR 90). Mr. Barnett testified that there was no evidence that there was any automatic protection device on respondent's premises.

It was the contention of respondent that the remote control valves at other premises were at refineries rather than bulk distributing plants. Mr. Barnett stated that there are manifold valves at the edge of the dike area (TR 82). Mr. Barnett testified that there is a closed circuit to the respondent's regional office in Atlanta, which was working at the time of the fire and that it is possible to call the Atlanta office and inside of a minute of less, the flow would be shut off without the necessity of going on the premises. It was stated, however, that the power supply burned out during the fire and it, therefore, would not have been possible through the normal power supply to cut it off from Atlanta (TR 85). Mr. Barnett, testified however, that the company had an auxiliary power supply (TR 86). He did not know whether or not it was working in this instance (TR 87). He stated he understood the explosion had

caused the power to go off and that the man from Atlanta couldn't cut it off after 6:40 a.m. (TR 88).

It was conceded that the respondent did not have manned deliveries. There was considerable testimony with reference to the policy of other companies. Mr. Purcell testified that the Shell Oil Company does not have a man present at all times that petroleum is being received. He stated that he knows this to be true in Knoxville, Chattanooga, Nashville, Memphis, Little Rock and Bristol, Virginia (TR 154). When men are present it is not for safety but to direct petroleum into the right tanks (TR 155). Mr. Barnett, area manager of Colonial Pipelines testified that some facilities are manned and some are not (TR 59). He stated that three of nine Colonial facilities in Knoxville have manned receipts. Three of eleven in Nashville have. None of the tanks in Chattanooga are manned (TR 70). Mr. Purcell testified that at the Plantation Oil Company from which he receives his oil, a man is present at all times that petroleum is transmitted to the premises (TR 68). He stated, however, that if there is a long receipt the man will go home (TR 170, 171). When there are deliveries of two or three hours, they keep a man there at all times. When Shell receives oil, Plantation has a man present at all times and he considers it a safety factor. Mr. Jackson of Exxon said that in Knoxville, Nashville, Johnson City, Louisville, Montgomery, Birmingham, which are under his direction, the receipts

of petroleum are manned at all times (TR 178). Between 1968 and 1972, the company did not have a man present for all of long deliveries, however, since 1972, the company has. During the four years that no one was required to be present, the man would come back several times to check the deliveries (TR 179). They were manned around the clock prior to 1968 (TR 180). This was done both to direct the products and for safety. He stated that Plantation has always had a man present (TR 180, 181). Mr. Weaver stated that Exxon has manned deliveries, Aamoco unmanned, Shell unmanned,(TR 267, 268). Mr. Parsons testified that there are a lot of devices but that they have always had a man at the tank farm when they brought any product in (TR 330). He stated they had a pipeline going north with unmanned pump stations (TR 331). Mr. McKenna testified that several years ago it was standard throughout the industry to have a man at the premises during the receipt of gasoline (TR 425). According to him, it was not necessary to have a man present all the time of the delivery and it was manned only part time (TR 425). They would line trucks up and get pumping started, leave and come back within an hour or so (TR 425, 426, 427). He stated that today the policy is to be there when they line up and transmit it into the tank. In night delivery they leave and come back within an hour before the termination of the pumping to handle the switching of the valves (TR 426). He stated that the tanks at Doraville, Georgia, are the only ones he knows of that are computerized (TR 426). He said perhaps others are partly computerized

(TR 427). Mr. Barnett stated that Colonial Pipelines since September 23, 1972, has had a man at all stations when oil is transferred (TR 80). Mr. Parsons testified that he doesn't know of anything that will replace the man for safety (TR 353).

Mr. Robert Johnson, graduate mechanical engineer and director of environmental affairs and safety for respondent, testified that he is familiar with his own terminals, familiar with terminals to which deliveries are made off of their pipeline system and has visited other terminals. He stated his normal procedure is to have a man at the deliver facility prior to receipt of the shipment to insure the terminal valves are lined up or that delivery valves are properly lined up to the gate tank and to be there when the delivery is started to insure that product quality is correct. He then after the stream of petroleum is going into the tank and after he has assured himself that the product is being received as scheduled, could leave and return at such a time or prior to such a time as might be necessary to make a product cut or such operation that requires a change of valves at the terminal (TR 510). He stated that where a terminal has completely manned deliveries, it is generally because the employee is there for other duties (TR 514). Mr. Laskosky, general manager of operations for respondent, testified that respondent has five facilities in the southwest and that they do not fully man receipt of deliveries there. He knows of no other

terminals in the southwest that are fully manned (TR 558, 559). He stated that he has delivered to Exxon in Helena, Missoula and .. Spokane, Washington, and their terminals are not fully manned.

Evidence as to presence or absence of unusual hazards on adjoining property is as follows:

The evidence established that there are several bulk facilities of other companies such as Shell and Exxon in the immediate vicinity of respondent's terminal; that the airport is near and that planes fly a flight pattern over the area of respondent's said terminal and that there is an Army ammunition base which ships TNT on a railroad track near the respondent's facility. These facts are undisputed. The manager of Shell Oil Company's facility stated that he does not feel that the location of the respondent presents any unusual safety hazard. Mr. Parsons testified that there are city codes and state codes which prohibit bulk plants at most sections of the city, that it always has been recognized that service stations, bulk plants, refineries, gasoline plants are hazardous in ordinary occupancy. He stated it is not unusual for the tank farms to be clustered but where they are clustered, there are problems (TR 357, 358). He stated that if they are spread all over the city there would be more of a hazard (TR 358). He stated the plants and things around them are not hazardous themselves until something goes wrong (TR 360). Mr. McKenna confirmed that it is common practice to group

pipeline terminals together (TR 407). He stated he did not see any unusual exposure hazard at respondent's premises (TR 404, 405). He stated the road was not an unusual hazard nor was the driveway, railroad track, airplanes or other facilities (TR 406). Mr. Purcell stated that tank facilities are generally located in the same general area (TR 173), and he felt that other tank farms in the area are not an unusual exposure (TR 174).

LTC Edward J. Bourgeois, Jr., the Commander of the Army Ammunition Depot, near the respondent's premises, testified that TNT is shipped over the railroad tracks near respondent's premises. He stated that TNT is not one of the most dangerous explosives, he testified that for TNT to explode after burning, it takes better than 475 degrees centigrade of heat (TR 132). He stated, however, that the Army's instructions are not to try to put out a fire where TNT is involved but just to get away from it (TR 133). He stated it takes a blasting cap or something like that to set off TNT. He stated the possibility of explosion was greater in a confined space (TR 142). He testified that during the calendar year 1972, on an average of approximately 2.7 rail cars per day were shipped by either Southern or the L & N Railroad from the volunteer Army Ammunition Plant. He stated that in 1972, they shipped 137,000,000 pounds, 106,000,000 of which were by rail. These shipments were made to various places all over the country. The depot is approximately two miles from the respondent's terminal. He stated that in rifle impact

tests, TNT explodes no more than two per cent of the time. When free burning in air, it would not be expected to explode. It would take at least a No. 6 blasting cap to ignite it. He stated that if it had six to seven per cent moisture in it, it would not be expected to explode with a No. 6 blasting cap and it would burn more than likely resulting in a very intense fire. The TNT after leaving the depot is ultimately used as a filler for high explosive artillery rifles. (TR 130, 137). He stated that the reason for not fighting the fire if the TNT is involved is the danger of an explosion. He quoted from Army Material Command Regulations as follows:

> "These materials can be expected to detonate when involved in a fire and except for Classes IV and V are subject to mass detonation. Therefore, no attempt to fight fires involving simply IV materials are made except for manual activation of installed fire extinguishing equipment. Personnel shall leave the building immediately using as much protective cover as possible and activating diluge system and fire alarm equipment while escaping." (TR 139, 140, 141).

He stated that a flash ignition in a box car being a confined space could cause an explosion with the resulting detonation of TNT. He stated that outside in the open burning would be more likely. He stated that signs are erected on the box cars stating that they are explosive and dangerous.

The manager of Shell Oil Company testified that in his opinion TNT box cars are not an unusual hazard (TR 163). Mr. McKenna stated that TNT on a railroad track is not an unusual

hazard, that TNT detonators are in separate cars. He knows of no instance where TNT was detonated in cars (TR 407). He stated that if TNT cars had come by and gas vapors had gotten into the cars it would not have exploded (TR 428). He was of the opinion, however, that the speed of the train would have prevented vapors from getting in. He stated that grass or anything else would have gone up in ignition, it would not have to be TNT (TR 428, 429).

It was undisputed that at the time of the accident the respondent only employed Mr. Ross and a part time assistant at the terminal. Mr. Weaver testified that the day of inspections September 28, 1972, there were a lot of employees around placing pump lines in the liquid (TR 253). He stated, however, that none of respondent's employees were in the ditch at the time of the fire (TR 251).

EVALUATION OF THE EVIDENCE

In subdivision (a) of part IV of the complaint, the complainant states:

> "The respondent violated section 29 CFR 1910.106(b)(2)(vii)(c)(5) in that respondent did not provide a drain with a uniform slope of not less than one per cent away from tank toward a sump, drain box, or other safe means of disposal to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains."

The Occupational Safety and Health Act relates only to the safety conditions for a respondent's own employees. The Act does

not cover any possible danger which may result from respondent's action to the public at large or to employees of other employers. It will be noted that the above-quoted standard with the requirement that a drain have a uniform slope of less than one per cent away from tank toward a sump, drain box or other safe means of disposal is qualified by the final clause which is "to prevent flammable or combustible liquids from entering natural water courses, public sewers or public drains." Said standard, therefore, is not violated unless the conditions referred to result in flammable or combustible liquids entering natural water courses, public sewers or public drains. The dumping of such materials in natural water courses, public sewers or public drains would tend to remove the flammable or combustible liquids from the area of the respondent's employees' employment and would expose the public at large to said dangers. If the flammable or combustible materials were removed from the area in which the respondent's employees would be working to areas beyond said site it would normally not enhance the danger to employees of the employer.

The program directive No. 100-11 of the Occupational Safety and Health Administration dated October 10, 1972, directed to national and field offices states with reference to this standard:

> Interpretations. The primary and express purpose of this standard is to avoid harm to adjoining property and to water ways. Any resulting

benefit to the safety and health of the employees appears to be secondary. Therefore, paragraph 1910.106(b)(2)(vii) is not intended to apply where its requirements do not have a substantial relationship to safety and health of employees. Each case will have to be considered on its own merits."

There is evidence that a water course runs near the railroad (TR 226). Since TNT is transported over the railroad burning petroleum in the water course could cause danger to employees.

The only evidence, however, of drainage into said water course was the testimony of Mr. Weaver that several days after the fire when the premises were being cleaned up he observed liquid running out of the drain pipes into said water course. He testified however, that the pipes were at the lower part of the dike and that gasoline floats on top of water. It would appear that it was only water that was being drained to said water course.

Any proof of fire in said area would have to be shown to result from drainage. This is not shown by the record.

Therefore, even if it should be held that the proximity of TNT to the water course would make said standard apply, the respondent has not carried his burden of proof as to this allegation.

The complainant alleges in Subdivision (d) of paragraph IV of the complaint that standard 29 CFR 1910.106(b)(2)(vii)(b)(3) is violated in the following respects:

"The respondent permitted drainage from the dike area to discharge flammable or combustible liquids into adjoining property and public drains which emptied into natural water courses and does not provide a system which does not permit flammable or combustible liquids to be so released."

This Judge is of the opinion that the same reasoning applied to the alleged violations of standard 29 CFR 1910.106(b)(2)(vii)(b)(5), is applicable to so much of this standard as relates to public drains. Said standard appears to relate to discharge of dangerous liquids on other property and public drains which would endanger the safety of the employees of other employers and the general public. There would appear, however, to be a distinction in the language of subsection (b)(3) as distinguished from the language of subsection (d)(5) above. In view of the surrounding property, this Judge is of the opinion that if the respondent improperly permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining property, explosion on the adjoining property could endanger the respondent's employees on its own property. It will be noted that an explosion on respondent's property caused an explosion on the property of Firestone, resulting in the death of two of Firestone's employees. It appears that it would be equally possible for an explosion on the property of another Oil company to result in injury or death to persons on the property of the respondent. Said standard does not provide as does the other standard previously referred to that its purpose is to prevent flammable or combustible liquids from entering natural water

courses, etc., but simply states that respondent permitted drainage from the diked area to discharge flammable and combustible liquids into adjoining property, etc. Petroleum entering natural water courses, public sewers or public drains would rapidly be swept away and would be confined to a definite course. On the other hand, drainage on to adjoining property not a public sewer, drain, etc. would constitute a real possibility of spreading a fire to the tank of other oil companies or possibly to the railroad tracks where TNT was being transported which could cause danger to respondent's employees.

It is, therefore, necessary to determine whether the respondent did permit drainage from the diked area to discharge flammable or combustible liquids into adjoining property.

The only proof of the fact that petroleum went outside the diked area is the testimony that there was a fire burning outside the diked area. It was testified that black smoke indicated petroleum was burning but it was further testified that any substance containing corbon could cause black smoke. Mr. McKenna testified that drainage and diking had nothing to do with vapors coming off the top of the tank. The evidence established that there were ways the grass could have caught fire other than through drainage of the petroleum. There were considerable vapors in the air so great that the police officer testified he had to stand on his car in order to get his breath. These vapors spread to the Firestone building, ignited and caused an explosion, bringing about two casualties. It is also evident that

there was a fire on a roof outside of the diked area which could not have been as the result of the petroleum draining to that area, but was probably as a result of vapors. It is entirely possible that the vapors from the tank could have ignited the grass outside the diked area. It is also possible that the explosion could have blown petroleum into an area where the grass beyond the diked area would have caught fire. One can only speculate as to which of these various possibilities was the real reason for the fire beyond the dike. The burden of proof is upon the Secretary, the complainant in this case. The Secretary has not established that the petroleum was running along the ground beyond the diked area and has not established, beyond mere speculation, the cause of the fire beyond the diked area. A respondent cannot be found guilty of violation of a standard by mere speculation. For this reason, this Judge is of the opinion that the allegations of the complaint that the standard has been violated, have not been sustained.

The complaint alleges that standard 29 CFR 1910.106(b)(2)(vii) (b)(2) was violated in that the respondent did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

The evidence is in dispute as to whether or not there was a basin. Mr. Laskosky testified that there was a drainage basin within the diked area. On the other hand, Mr. Weaver testified that no such basin or sump existed. Irrespective of whether or not there

was a drainage basin, there is no evidence in the record that a drainage basin existed of sufficient size to hold the capacity of the largest tank. The respondent contended that the entire dike area should be included in determining whether or not a basin would hold the capacity of the largest tank. It was stipulated that the diked area was adequate in size to hold this much petroleum. This Judge is of the opinion, however, that the standard does not contemplate the entire dike area in referring to an impounding basin. The purpose of an impounding basin is to drain the petroleum to a confined area in which foam or other fire extinguishing material may be applied. It would not be possible to do this over the entire area within the diking. The petroleum running over an area within the entire diked territory would cause the petroleum on fire to reach the other tanks and cause a greater fire with the possibility of additional explosion. Therefore, the contention of the respondent that the entire diked area should be considered a basin which could hold the contents of the largest tank cannot be sustained. A basin that would not hold the contents of the largest tank does not meet said standard. Therefore, irrespective of whether a basin did or did not exist, the standard has not been complied with and the allegations of the complaint alleging violation of said standard have been established.

Due to the extreme danger and the record of loss of life in such fires, the proposed penalty in the amount of $700.00 appears to be proper.

It is alleged in the complaint that standard 29 CFR 1910.106(f)(8) has been violated in that the respondent did not provide fire extinguishing equipment sufficient to extinguish a fire in the largest tank where Class I liquids were stored in amounts greater than 50,000 gallons and unusual exposure hazards existed from surrounding property. It was stipulated that the respondent did have a tank which stored 52,000 barrels which is, of course, substantially greater than 40,000 gallons. There is considerable difference between the parties as to whether the property surrounding the respondent's installation constituted unusual exposure hazards. It is not unusual for a number of oil companies to have their storage tanks within the same vicinity. The evidence established that this is a common practice. Therefore, the presence of Shell Oil, Exxon and other companies' tanks is not unusual and does not constitute unusual exposure hazards. This Judge is also of the opinion that airplanes flying over do not constitute unusual exposure hazards. A much closer question arises as a result of the Ammunitions Depot and the transporting of TNT along the railroad track. It is true that the Lt. Colonel in charge of the munitions depot testified that TNT is not the most dangerous of explosives; that it takes a very hot fire to cause it to explode. He further stated, however, that because it is in a confined area when it is in a box car, it is possible for it to ignite and to explode. He stated the possibility would be minimized if it was in an open area. He further testified that Army instructions are not to fight

such a fire but to get away from it because of the danger of explosion. This Judge is of the opinion that the presence of TNT in the vicinity does constitute an unusual hazard.

This Judge is of the opinion, however, that said standard has not been violated for the following reasons:

It is established by the preponderance of the evidence that although the respondent has substantial fire extinguishing equipment, this equipment is not adequate to extinguish an oil fire of the magnitude described in the standard. The evidence, however, is to the effect that fire extinguishing equipment sufficient to put out a fire in the largest tank of respondent simply does not exist. The fact that compliance with the standard is expensive or difficult would not excuse the respondent from complying. This Judge is of the opinion, however, that a standard cannot compel a respondent to perform an impossibility. If the equipment sufficient to put out a petroleum fire in a large tank has not as yet been invented, the respondent cannot be found guilty of violation of the standard for failing to do the impossible. The evidence shows that the respondent does have very substantial firefighting equipment. Because the evidence establishes that compliance with the standard is impossible and the Judge is of the opinion that the respondent has made a diligent effort to secure such fire fighting equipment as is reasonably possible, violation of this standard has not been established.

It is further alleged in the complaint that the respondent has violated the so-called general duty section of the statute. Said section 5(a)(1) of the Act provides that the respondent is in violation if it fails to furnish its employees a place of employment which is free from recognized hazards; that will cause or are likely to cause death or serious physical harm to its employees.

It will be noted that for a respondent to be found in violation of said section of the Act, it is necessary that it constitute a recognized hazard. "Recognized hazard" has been held to be a hazard that is recognized in the industry rather than necessarily a hazard which the respondent himself recognizes. There is no question that it is recognized that fuel escaping from a storage tank is a very real and definite hazard. Statistics introduced in evidence established that there are approximately three and one-half fatalities for every fire of this nature which has occurred. It is not adequate, however, to find that such a fire is hazardous, but it must be established that some action that the respondent did or did not take is recognized as hazardous within the industry.

It is alleged that an employee of respondent was required to enter the premises of the terminal to work where vapor laden air was hazardous to the employee. As above noted, the facts established that Mr. Ross, the employee who lost his life at the time of this fire, went upon the premises for the purpose of cutting off the valve to stop the continued flow of petroleum. Whether he was justified in

taking this action and whether it was necessary and whether the respondent should be held responsible for this action is very strongly controverted in this case. It is insisted by the respondent that Mr. Ross had been instructed that he should, under these circumstances, call the regional office in Atlanta and that such a call would have resulted in a cut off of the flow of petroleum within a time of less than one minute. On the other hand, it is not disputed that the explosion disrupted the contact with Atlanta and it would not have been possible after the explosion to call Atlanta on the regular service. There was testimony in the record that there was an auxiliary service which might have enabled a contact to be made. There is no doubt that it was essential for the flow of gasoline to be stopped. This position of the complainant is very closely tied to the further contention of the complainant that the respondent was in violation of the general duty standard by not providing remote devices for cutting off gasoline pumps in emergency conditions. The question remains, however, as to whether it was a recognized requirement in the industry. The record establishes that remote control valves were not generally used in the industry. Mr. Barnett said he was not familiar with any duplicate set of valves arrangement anywhere in the pipeline industry. Mr. Johnson stated that remote valves were not rare but they were not common either (TR 518). Mr. Jackson, superintendent of Exxon, testified that Exxon only has valves on the

tanks themselves. On the other hand, the National Fire Protection Handbook stated that emergency remote controls are frequently provided for valves or pumps particularly at dispensing locations. Mr. Laskosky said that he believed remote valves were desirable and would increase the hazard because of added strain a cut off would make on the pipeline.

There was testimony from the respondent that the use of remote valves was almost entirely at refineries as distinguished from bulk tank distribution points. The type of storage is the same but it was the position of the respondent that there are differences in the types of operation which justify distinctions.

This Judge is of the opinion that remote valves could be used and probably are desirable for emergency situations. If there was a standard requiring their use, this Judge would have no hesitancy in finding a violation of said standard. The general duty provisions of the Act, however, require it to be established, not only that an additional precaution is desirable, but require it to be shown that such precaution is accepted as a necessity in the industry. There apparently is some difference of opinion in the industry as to the desirability of remote control valves and it would appear that most petroleum companies do not have them. Under these circumstances, it cannot be said that the absence of such a valve creates a recognized hazard. If remote control valves are needed as an

added precaution to safety, this need addresses itself to the Secretary and to the power to promulgate the standards. It would not be proper for the Review Commission to, under the guise of the general duty provisions of the Act, in effect promulgate a standard.

It is the further position of the respondent that automatic devices or persons should have been employed to detect accidental discharge of flammables so that hazardous conditions which could endanger employees and others could be prevented. This Judge is of the opinion that this contention is analogous in its effect to the contention just discussed above. Apparently, there are alarms and other devices which would be helpful and would add to safety, none of which the respondent used. The complainant introduced into evidence and also read in the record, excerpts from the National Fire Protection Handbook as follows:

> Continuous analysers. Continuous analysers are permanently installed, line powered devices for continously analyzing air samples from one to as many as 20 points. They may be either of the remote detection (deffusion) type or may grow samples through tubing to a central location by means of a suction pump or equivalent. The functions may include auditory or visable alarms in addition to continuous recording of data, two level alarms, e.g., a warning light at 40 per cent l.f.l. and an audible alarm at 50 per cent of l.f.l. automatic shut down or start up of equipment and similar features as required by the individual application.

> The central equipment is available either for installation or non-hazardous locations such as control rooms or in listed explosion-proof inclosures for hazardous areas. Continuous analysers are frequently tailor made to meet the exact requirement of a particular installation and they also employ operating procedures other than catalystic combustion.

Mr. Laskosky testified that such equipment is not common in the industry. It was testified that equipment could be used for setting off alarms, cutting off valves or giving off signals. It was testified by Mr. Parsons that such equipment is common in refineries, that refineries will have both audible and visible alarms actuated simultaneously. He testified that after the company he formerly worked for put in automatic alarm systems, no persons were killed that he knows of, although they had a terrible fire and explosion prior to the use of this system. Mr. Jackson testified that Exxon company has fire alarms in Birmingham and that they are being installed in Knoxville. Mr. McKenna stated some companies use alarms but it is not an industry practice. He conceded, however, that Exxon is a large part of the industry and that if Exxon used them there was a substantial part of the industry using this equipment. He testified that there are devices that set off alarms that can turn off valves and can signal the pipeline all the way across the country to turn off valves. Mr. McKenna stated that common carrier pipelines do not have "this exotic" equipment. He stated that a company

would either buy an alarm system or would modify the existing to shut the flow off in an emergency. Mr. Lankosky stated that [illegible] standards relating to alarms and shut down devices are not applicable to bulk terminals. Mr. Lankosky testified that a refinery plant must have specific temperatures, flows and pressures at very precise levels in order to get the type of product desired and, therefore, there are alarms and other equipment regulating temperatures, flows pressure levels and so forth. He stated that to shut off a refinery would be disasterous; that the entire situations are different.

It appears to this Judge that a good case can be made for the contention that alarms and the other equipment described are desirable. There are three and one-half deaths for each fire of this nature. Every possible precaution would, therefore, be indicated. It remains true, however, that the Secretary has not seen fit to make such a requirement by promulgating a standard. It is not for this Judge to suggest to the Secretary what he should so and when to promulgate a standard. There is apparently some use of such devices in the industry, particularly by Exxon which is one of the largest companies in the industry, however, the evidence is not clear as to whether a majority of the companies in the industry use any of these devices. It cannot be said that the industry recognizes these devices as a necessity for safe operations, and therefore, the allegations of violation of this section of the Act because of lack of alarms and other equipment cannot be sustained.

Although some companies have completely manned deliveries the evidence establishes that most companies do not. It may well be argued that manned deliveries in view of the hazards involved would be a helpful precaution. The fact remains that no standard has been cited requiring it and the evidence does not establish that the industry considers it a hazard not to man the deliveries. Therefore, for the same reasons set forth above in discussion of alarms and other safety devices, the respondent cannot be found to be in violation of the general duty clause because of failure to have manned deliveries.

It is alleged that the respondent violated the Act and standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) in that the diked area contained approximately six tanks which were not subdivided by drainage channels or intervening curbs in order to prevent the spills fron endangering adjacent tanks within the diked area and to reduce surface for vaporization of flammables. Mr. Weaver testified that at the time he inspected the premises, several days after the fire, said drainage ditches were not to be found. On the other hand, Mr. Laskosky testified that the plans for the facilities required that drainage ditches be dug. Exhibits 17, 18 and 19, which are blue prints of the facilities prepared at the time of various stages of construction were introduced into evidence through Mr. Laskosky and include drainage ditches. Mr. Laskosky, however, stated that he had not inspected the property subsequent to construction, and therefore,

he did not personally see whether or not the plans were implemented. Respondent's Exhibit 23 is an aerial photograph on which Mr. Laskosky pointed out and marked the area which he stated the photograph showed to be the ditches in question. An examination of this photograph under a magnifying glass does appear to reflect what would seem to be drainage ditches. It was testified by Mr. Laskosky that the ditches could have been very substantially eroded as a result of the fire fighting, the tremendous amount of water, foam, etc. used to extinguish the fire. Respondent's Exhibit 23 as viewed under a magnifying glass substantiates this testimony. The evidence established that a large number of truck drivers were constantly on the premises picking up petroleum for their respective companies. None of these drivers were called to the stand by either party. The evidence on this question is not entirely clear. The complainant presented prima facie evidence that several days after the fire ditches were not observed. It is entirely possible that there could have been considerable washing and change in the ground as a result of several days of fire fighting. On the other hand, although the respondent clearly proved that the plans, which were otherwise implemented, called for such ditches, the only evidence that the ditches were actually dug is respondent's Exhibit 23. The issue is not free from doubt but this Judge is of the opinion that the testimony of Mr. Laskosky that the places on the photograph which

he marked were the ditches in question, is substantiated by the photograph itself as it does appear to contain such ditches. This photograph was taken subsequent to the fire. This evidence coupled with the three exhibits of plans introduced, including the testimony of Mr. Laskosky that the plans represent the work that was to be done and that he had no reason to assume that it was not done lead this Judge to the opinion that the complainant has not by the greater weight of the substantial evidence established that the standard has been violated. At best, the complainant's evidence is to the effect that subsequent to the fire with the possible erosion and washing, the ditches were not present. In the opinion of this Judge even this fact is contradicted by Respondent's Exhibit 23.

FINDINGS OF FACT

1. Respondent is a corporation having its principal office at Ponca City, Oklahoma, and maintaining a place of business at Chattanooga, Tennessee, for the receiving, storing and delivery of petroleum products.

2. Respondent, at all times relevant to this case, regularly employed employees who are engaged in handling, transporting, storing and receiving petroleum products, substantial quantities of which are transported, shipped and delivered across various state boundaries. Respondent is engaged in a business affecting commerce within the meaning of section 3(a) of the Act.

3. On or about September 25, 1972, there was a spillage of petroleum from one of the respondent's tanks at Chattanooga, Tennessee, and a fire and explosion ensued.

4. As a result of said fire and explosion, Mr. Don L. Ross, an employee of the respondent was severely burned and subsequently died from his burns.

5. Two employees of Firestone Tire and Rubber Company, working in a building of Firestone Tire and Rubber Company near respondent's premises were killed in an explosion which resulted when fumes from the fire at respondent's terminal ignited.

6. Respondent had six petroleum storage tanks on its premises at Chattanooga, Tennessee, at the time of said fire and explosion, the largest of which tanks was a nominal 55,000 barrel tank with an actual capacity of approximately 52,000 barrels. The largest tank did not catch fire at the time of said incident.

7. Class I liquids as referred to in the Occupational Safety and Health Standard were stored in respondent's tanks.

8. At the time the tanks were being filled on September 25, 1972, and the fire and explosion occurred, the respondent did not have an employee at the tank overseeing the filling of said tank.

9. Some petroleum companies in the industry have employees present throughout the time that petroleum is being received in the tanks from the pipelines, but the evidence fails to establish that the majority of the industry does so.

10. The respondent did not have a system of alarms or other automatic detection devices to detect accidental discharge of flammables.

11. Some petroleum companies in the industry have such alarms and other automatic detection devices, but the evidence fails to establish that a majority of the industry does so.

12. Respondent provided a drain with the uniform slope of approximately two per cent away from the tank.

13. The respondent did not have a drainage basin system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank.

14. The respondent did have drainage ditches as required by the standard, including drainage ditches around its tanks.

15. The respondent had diking as required by the standard.

16. The evidence does not establish that fire which occurred beyond the diked area resulted from drainage beyond the dike.

17. The evidence does not establish that petroleum drained beyond the dike.

18. Drainage into the public drainage ditch which ran along the railroad, consisted of water and the evidence does not establish that it included petroleum.

19. Shell Oil Company, Exxon Oil Company and other companies had bulk storage tanks on their premises which immediately adjoin the

premises of the respondent in Chattanooga, Tennessee, and the path of flight to the commercial airport of the City of Chattanooga was immediately above the premises of the respondent.

20. The United States Army has an Ammunition Depot approximately two miles from the premises of the respondent and TNT was shipped from said depot over a railroad track immediately adjoining the premises of the respondent. A public water way, into which water drained from the respondent's premises, ran along side said track. The shipment over said railroad tracks of TNT constituted an unusual hazard.

21. The respondent had substantial equipment to extinguish fires, but there is no equipment invented which will extinguish a fire in a large petroleum storage tank and, therefore, respondent's equipment was not adequate to extinguish a fire in the largest tank.

22. The respondent had a cut off valve to cut off the flow of petroleum into the tanks on its premises, but did not have a remote valve beyond the danger area. The evidence does not establish that remote cut off valves are used by a majority of the industry.

23. The flow of petroleum could have been cut off in less than a minute's time by calling the respondent's Atlanta, Georgia facility and having it cut off by actions from Atlanta.

24. After the explosion occurred, the normal means whereby the flow of petroleum could have been cut off by communicating with Atlanta were severed.

25. The evidence establishes that there were auxiliary power sources in case of a failure of communication and power from Atlanta, but the evidence does not clearly establish whether same were functioning.

26. The evidence does not establish that respondent required an employee to needlessly enter its premises where vapor laden air was hazardous to the employee under circumstances which would constitute a recognized hazard.

27. The respondent has not failed to furnish its employees a place of employment which is free from recognized hazards that would cause or were likely to cause physical harm to its employees.

CONCLUSIONS OF LAW

1. The respondent, at all times relevant to this cause, was engaged in a business affecting interstate commerce and, therefore, is covered by the Act and the Occupational Safety and Health Review Commission has jurisdiction of this proceeding.

2. Respondent did not on September 25, 1972, violate Occupational Safety and Health Standard 29 CFR 1910.106(c)(2)(vii)(c)(5).

3. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(f)(8).

4. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(b)(2)(vii)(b)(3).

5. Respondent did not on September 25, 1972, violate section 5(a)(1) of the Act.

6. Respondent did not on September 25, 1972, violate standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i).

7. On September 25, 1972, respondent violated standard 29 CFR 1910.106(b)(2)(vii)(b)(2) in that it did not provide a drainage system that terminated in vacant land or impounding basin having a capacity not smaller than that of the largest tank. This was a serious violation and the respondent should be assessed a penalty in the amount of $700.00 for said violation.

ORDER

It is therefore Ordered that:

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(c)(2)(vii)(c)(5) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(f)(8) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(3) are dismissed.

The allegations of the complaint alleging violation of standard 29 CFR 1910.106(b)(2)(vii)(c)(7)(i) are dismissed.

The allegations of the complaint alleging violation of section 5(a)(1) of the Act are dismissed.

The respondent be and hereby is found to be in violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(2) and section 5(a)(2) of the Act. A penalty in the amount of $700.00 is hereby assessed for

violation of standard 29 CFR 1910.106(b)(2)(vii)(b)(2). The abatement date as set forth in the citation and complaint be and hereby is affirmed for violation of said section.

Dated this _____ day of 8 AUG 1973, 1973.

JOHN S. PATTON, Judge

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OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION
RECEIVED
AUG 10 1973
Office of the Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of November, 1980, I served the above Separate Appendix to Petition for Certiorari on behalf of the Petitioner by depositing three (3) copies thereof in a United States post office or mailbox with first-class postage prepaid to all counsel of record and also to the Solicitor General at the following addresses, all in accordance with Rule 28 of the Rules of the Supreme Court of the United States:

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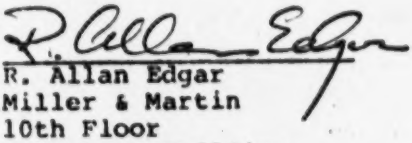

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No. 80-880

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONTINENTAL OIL COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard in holding that petitioner had violated the general duty clause of the Occupational Safety and Health Act of 1970.

2. Whether the general duty clause, as interpreted and applied by the court of appeals, is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-9) is reported at 630 F. 2d 446. The decision of the Occupational Safety and Health Review Commission (Pet. App. 11-22) affirmed by the court of appeals is reported at 1978 Occup. Safety & Health Dec. (CCH) para. 22,903. The original decision of the Review Commission (Pet. App. 23-49) is reported at 1974-1975 Occup. Safety & Health Dec. (CCH) para. 19,717. The opinion of the Review Commission's administrative law judge (Pet. App. 50-94) is summarized at 1973-1974 Occup. Safety & Health Dec. (CCH) para. 16,413.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980. A petition for rehearing was denied on November 4, 1980 (Pet. App. 10). The petition for a writ of certiorari was filed on November 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates a pipeline terminal facility in Chattanooga, Tennessee, where petroleum products are stored in tanks until loaded onto trucks for local distribution (Pet. App. 3). The petroleum products are piped to the tanks from a common carrier pipeline with a centralized dispatch facility near Atlanta, Georgia, and a local dispatch facility near petitioner's terminal facility (*ibid.*). On September 25, 1972, an explosion at petitioner's facility killed three persons (*id.* at 4).

At the time of the accident that resulted in this litigation, the terminal facility was operated by one employee, the terminal manager, who was required to be present at the facility to check the available capacity of the tanks before each pipeline delivery (Pet. App. 4). The manager could leave the terminal after the delivery had commenced, but he

was required to return before its scheduled completion (*ibid.*). The manager could stop the product flow by telephoning either the central or local dispatch facility, or by closing the manual valves at the terminal facility (*ibid.*). When the manager was absent from the terminal, the tanks were completely unattended, and the facility was not equipped with any automatic devices to detect tank overflows.

On September 25, 1972, a truck driver preparing to load his truck at the terminal facility discovered that gasoline was overflowing from one of the tanks (Pet. App. 4). The driver left the facility and notified the absent terminal manager that the gasoline was overflowing (*ibid.*). The manager immediately returned to the terminal area and attempted to stop the flow by manually closing the valves (*ibid.*). An explosion thereafter occurred, killing the manager and two other persons who were working in an adjacent plant (*ibid.*).

Based on an investigation by a compliance officer of the Occupational Safety and Health Administration, the Secretary of Labor issued various citations (see Pet. App. 24-25), including a citation which charged that petitioner had violated the "general duty clause" of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1),[1] by exposing its employees to the likelihood of serious physical harm resulting from hazards of fire and explosion caused by gasoline overflows (Pet. App. 4-5). The Secretary proposed that petitioner free the workplace of such hazards by using automatic detection devices and by maintaining the presence of personnel throughout the gasoline delivery process (*id.* at 5-6).

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[1]Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The evidence at the administrative hearing demonstrated that fires resulting from overflowing petroleum storage tanks present a serious danger to employees and that an average of three and one-half lives are lost in each such fire (Pet. App. 13-14, 80). Some employers in the industry, including Exxon, employ automatic detection devices and require that personnel be present during delivery—the safety measures proposed by the Secretary—but other companies do not do so (*id.* at 15, 65-67, 84-86). The utility of these safety measures was recognized, however, both by witnesses who testified on behalf of the Secretary and by those who testified for the employer (*id.* at 9, 15).

Following the hearing, the administrative law judge vacated the citation on the ground that the evidence failed to establish that a majority of firms in the industry used the measures urged by the Secretary (Pet. App. 85-86, 89-90). The ALJ thus concluded that the measures were not "recognize[d]" as necessary in the industry and that the general duty clause therefore did not require their use (*id.* at 85-86).

On review, the Occupational Safety and Health Review Commission initially affirmed, by equally divided vote, the ALJ's disposition of the general duty clause citation (Pet. App. 34-35). The Secretary petitioned for review in the court of appeals, which remanded the case to the Commission for further consideration (*id.* at 4). On remand, the Commission found that petitioner had violated the general duty clause. The Commission held that industry knowledge must determine whether a hazard is recognized, but that industry practice does not limit the safety precautions that must be taken to abate a recognized hazard (*id.* at 14-15). The Commission found that the Secretary had met his evidentiary burden by proving that the overflow of gasoline from storage tanks is recognized as a hazard both by petitioner and by the industry as a whole, and that a manned delivery system and automatic detection devices are feasible

and reasonable means of preventing such spills (*id.* at 13-15). The Commission assessed a $500 penalty for the violation (*id.* at 16). The court of appeals affirmed.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-13) is that the decision of the court below, holding that petitioner had violated the general duty clause of the Act (29 U.S.C. 654(a)(1)), conflicts with decisions of other courts of appeals which have found that a "reasonable man" test is implicit in the general duty clause of the Act, as well as in the Secretary's general safety standards, which require that an employer provide "necessary" or "appropriate" personal protective equipment in operations exposing employees to hazardous conditions. See 29 C.F.R. 1910.132(c); 29 C.F.R. 1926.28(a). The major premise of petitioner's contention, that the court of appeals did not employ a "reasonable man" test, is erroneous. The Sixth Circuit explicitly relied on its previous decision in *Ray Evers Welding Co.* v. *OSHRC*, 625 F. 2d 726, 731 (1980), in which it construed 29 C.F.R. 1926.28(a), a personal protective equipment standard, as requiring the employer to do that which would be done by "a reasonably prudent employer, concerned with the safety of his employees." Moreover, the court in *Ray Evers Welding Co.* v. *OSHRC, supra*, 625 F. 2d at 731, explicitly noted that its "holding is consistent with our decision in *Schriber Sheet Metal & Roofers, Inc.* v. *OSHRC*, 597 F. 2d 78 (6th Cir. 1979), adopting a similar test for compliance with the general duty clause (Section 5(a)(1) of the Act)."[2]

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[2]Although petitioner contends that the general duty clause would be unconstitutionally vague without a "reasonable man" test, it concedes (Pet. 23-27) that such a test would cure any possible constitutional infirmity. Because the Sixth Circuit applied that test here, there is no substance to petitioner's constitutional contention.

The decision of the court below is consistent with the decisions of other courts of appeals, not only with respect to the "reasonable man" test but also with respect to the overall analysis to be applied in these cases. To prove that an employer has violated the general duty clause by failing to "free" its workplace of a "recognized hazard,"[3] the courts have required the Secretary to show that the relevant industry, or the employer himself, recognizes a condition as hazardous and that the employer has failed to undertake safety measures that would be regarded as useful or feasible by a reasonably prudent employer or by a reasonably conscientious safety expert[4] familiar with the industry. *National Realty & Construction Co.* v. *OSHRC*, 489 F. 2d 1257, 1265-1267 (D.C. Cir. 1973); *General Dynamics Corp.* v. *OSHRC*, 599 F. 2d 453, 464 (1st Cir. 1979); *Brennan* v. *Smoke-Craft, Inc.*, 530 F. 2d 843, 845 (9th Cir. 1976). See also *Voegele Co.* v. *OSHRC*, 625 F. 2d 1075, 1078-1080 (3d Cir. 1980); *Bristol Steel & Iron Works, Inc.* v. *OSHRC*, 601 F. 2d 717, 722-723 (4th Cir. 1979).

The court below correctly applied this test here. First, the court affirmed the Commission's finding that petitioner had recognized the danger posed by overflowing storage tanks (Pet. App. 5-6, 13-14). Second, the court noted that " '[t]he question is whether a precaution is recognized by safety experts as feasible' " (*id.* at 8, quoting *National Realty &*

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[3]To establish a violation, the Secretary must also show that the hazard is "causing or * * * likely to cause death or serious physical harm" (Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1)). See, *e.g.*, *National Realty & Construction Co.* v. *OSHRC*, 489 F. 2d 1257, 1265 (D.C. Cir. 1973); *Illinois Power Co.* v. *OSHRC*, 632 F. 2d 25, 28 (7th Cir. 1980). Petitioner does not dispute that this aspect of the test is met here.

[4]The courts have apparently used these terms interchangeably to describe the same standard. See *General Dynamics Corp.* v. *OSHRC*, 599 F. 2d 453, 464 (1st Cir. 1979); *Magma Copper Corp.* v. *Marshall*, 608 F. 2d 373, 376-377 (9th Cir. 1979).

Construction Co. v. *OSHRC, supra,* 489 F. 2d at 1266 n.37) and held (Pet. App. 9) that the "safety utility," "feasibility and reasonableness" of the measures proposed by the Secretary were supported by substantial evidence, including evidence that these measures were used by other firms in the industry.

In the context of the personal protective equipment standards, as petitioner notes (Pet. 9-11), the Fifth Circuit has framed the "reasonable man" test in a form that is somewhat different from that used by other courts of appeals. Without exception, the courts of appeals have recognized that the customary practice of an industry constitutes relevant evidence of the precautions that a reasonably prudent employer would take. However, the Fifth Circuit alone[5] has gone so far as to suggest that industry practice "generally establishes" the extent of the employer's obligations in the absence of "compelling evidence" that the practice is unsafe. See *Cotter & Co.* v. *OSHRC*, 598 F. 2d 911, 913, 914 n.5 (5th Cir. 1979); *Power Plant Division* v. *OSHRC*, 590 F. 2d 1363, 1365 (5th Cir. 1979); *B & B Insulation, Inc.* v. *OSHRC*, 583 F. 2d 1364, 1370-1371 (5th Cir. 1978). Other courts that have considered the question have rejected the Fifth Circuit's emphasis on industry custom on the ground that " '[s]uch a standard would allow an entire industry to avoid liability by maintaining inadequate safety' " (*Voegele Co.* v. *OSHRC, supra*, 625 F. 2d at 1078,

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[5]Petitioner erroneously asserts (Pet. 11-12) that the Seventh and Tenth Circuits have adopted the Fifth Circuit's formulation of the "reasonable man" test. In *Marshall* v. *L.E. Myers Co.*, 589 F. 2d 270, 272 (1978), however, the Seventh Circuit held only that the Secretary had failed to prove that his proposed method was safer than the method already being used by the employer. Similarly, the basis for the Tenth Circuit's decision in *H-30, Inc.* v. *Marshall*, 597 F. 2d 234, 235 (1979), was that the Secretary had selected the wrong industry for purposes of demonstrating that the hazard at issue was "recognized."

quoting *General Dynamics Corp.* v. *OSHRC, supra*, 599 F. 2d at 464).[6]

For several reasons, this slight variation in the precise formulation of the "reasonable man" test does not warrant review. First, whatever difference exists is an extremely narrow one, which amounts only to a slight variation in emphasis. The Fifth Circuit has not held that industry practice is conclusive, but only that it "generally" establishes the extent of the employer's obligations. The practical distinction between this formulation and that of the other courts of appeals is not yet certain. Several cases that were argued in the Fifth Circuit on October 27, 1980, and are now awaiting decision, may clarify the extent of the actual conflict, if any. See *Owens-Corning Fiberglas Corp.* v. *Marshall*, No. 79-2516; *Power Plant Div., Brown & Root, Inc.* v. *OSHRC*, No. 79-3677; *S & H Riggers & Erectors, Inc.* v. *OSHRC*, Nos. 79-2358, 80-7297; *Standard Roofing & Sheet Metal, Inc.* v. *OSHRC*, No. 79-3319. Accordingly, further development of the issue in the courts of appeals is appropriate.

Second, the Fifth Circuit developed its industry practice test in cases involving personal protective equipment standards. To date, the court has not clearly applied the test to the general duty clause itself, which is the provision at issue here.[7] Thus, any existing conflict is indirect at best.

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[6]Accord: *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F. 2d at 1266 n.37 *Bristol Steel & Iron Works, Inc.* v. *OSHRC, supra*, 601 F. 2d at 723; *Ray Evers Welding Co.* v. *OSHRC, supra*, 625 F. 2d at 730, 731-732.

[7]Indeed, in cases arising under the general duty clause, the Fifth Circuit has generally applied the test enunciated by the District of Columbia Circuit in *National Realty & Construction Co., supra*, as the Sixth Circuit did here. See *Georgia Electric Co.* v. *Marshall*, 595 F. 2d 309 (5th Cir. 1979); *Getty Oil Co.* v. *OSHRC*, 530 F. 2d 1143 (5th Cir. 1976). However, the Fifth Circuit, in a case involving the general duty

Third, the result reached in this case would not have been different under the Fifth Circuit's formulation in any event. The Fifth Circuit has declined to uphold citations where, "in an industry of multiple employers, not one of them would have followed [the Secretary's proposed] course of action" (*B & B Insulation, Inc.* v. *OSHRC, supra*, 583 F. 2d at 1370), or where the Secretary introduced no evidence of customary industry practice (*Power Plant Division* v. *OSHRC, supra*, 590 F. 2d at 1365). In this case, however, the record shows that while not every company in the industry uses automatic detection devices and completely manned deliveries—the safety measures proposed by the Secretary—some companies, including Exxon, the industry leader, do employ these measures. Moreover, petitioner does not challenge the Commission's findings, which were affirmed by the court of appeals (Pet. App. 9), that these measures constitute a feasible and useful means of reducing the extremely serious hazards associated with spilled petroleum products.

Finally, all courts that have considered the question agree that it is unnecessary to determine whether some hypothetical "reasonable man" would have recognized the danger if

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clause, recently cited its decision in *B & B Insulation, Inc.* v. *OSHRC, supra*, where it first stated the industry practice test. See *R.L. Sanders Roofing Co.* v. *OSHRC*, 620 F. 2d 97 (5th Cir. 1980). In *Sanders*, the court held that the employer had not violated the general duty clause by failing to install a guardrail around a flat roof on which roofers were working. The court relied primarily on the fact that a specific standard promulgated under the Act requires guardrails on roofs only where the slope exceeds four inches in twelve (*id.* at 99). The court further stated that falling from a flat roof was not recognized as a hazard in the roofing industry, and cited *B & B Insulation, Inc., supra*, in support of the proposition that the Secretary should promulgate a specific standard requiring guardrails if, industry practice notwithstanding, he believed that they are necessary (*id.* at 100-101). The *Sanders* court was concerned because the fall hazard was not one that was recognized; it did not rule on the test for determining the safety measures required where, as here, the industry does recognize the existence of a hazard.

an employer has actual knowledge of a hazardous condition requiring preventive measures. See *Cotter & Co.* v. *OSHRC*, 598 F. 2d 911, 914 (5th Cir. 1979); *Cape & Vineyard Division* v. *OSHRC*, 512 F. 2d 1148, 1152 (1st Cir. 1975); *Brennan* v. *OSHRC*, 494 F. 2d 460, 463-464 (8th Cir. 1974). The record here contains substantial evidence that petitioner had such actual knowledge.

The Commission found that petitioner recognized that the explosive vapors that are released by gasoline overflowing from a storage tank posed a danger to its employees (Pet. App. 13). Petitioner was "well aware of the circumstances surrounding * * * [an] explosion [and fatality at a nearby storage tank] and knew that the neighboring storage tank farm, like its own, followed a procedure called 'unmanned delivery' in filling its tanks" (*id.* at 14). The Commission also noted that petitioner's own witness recognized the safety utility of high level alarms used in conjunction with manned delivery (*id.* at 15). Thus, petitioner actually knew of the potential danger on its premises, the inadequacy of unmanned delivery in avoiding tank overflows, and the existence of a materially safer method of conducting its business. In these circumstances, it is clear that petitioner violated its obligation under the general duty clause of the Act, and any difference in approach among the circuits is immaterial.

2. Petitioner also contends (Pet. 27-29) that the decision below conflicts with this Court's ruling in *Industrial Union Department* v. *American Petroleum Institute* ("*Benzene*"), No. 78-911 (July 2, 1980), because the decision imposes safety obligations on employers limited only by the constraint of feasibility. In *Benzene*, a plurality of the Court held that, before the Secretary may promulgate a permanent occupational safety and health standard under Section 6(b) of the Act, 29 U.S.C. 655(b), he must make a threshold

finding that the hazard addressed by the standard currently poses a "significant risk" to safety or health that the new standard would reduce (slip op. 28-32).

Petitioner's reliance on *Benzene* is misplaced because Section 5(a)(1) of the Act, which is at issue here, does not incorporate the definitional provision of Section 3(8), 29 U.S.C. 652(8), which was involved in *Benzene*. At all events, the Sixth Circuit's construction of the general duty clause does not require the employer to do everything feasible to protect against every risk to his employees' safety and health. On the contrary, Section 5(a)(1) includes the same type of threshold determination of significant risk that the *Benzene* plurality required for the issuance of permanent standards under Section 6(b). Section 5(a)(1) requires an employer to free his workplace only of "recognized hazards" that are "causing or are likely to cause death or serious physical harm to his employees." In the instant case, the ALJ noted that there are an average of three and one-half deaths for every fire caused by overflowing storage tanks (Pet. App. 85), and the court of appeals determined that the safety precautions proposed by the Secretary were a reasonable and useful means of reducing this substantial safety hazard (*id.* at 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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